Petition

81-1776

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

OCTOBER TERM, 1981

CORNELIUS LEWIS,

Petitioner,

vs.

STATE OF ILLINOIS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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QUESTIONS PRESENTED

1. Whether Cornelius Lewis' death sentence, imposed pursuant to the Illinois Death Penalty Act, Chapter 38, Section 9-1 *et seq.*, violates the Eighth and Fourteenth Amendments to the Constitution of the United States in the following respects:

(a) Said statute as utilized fails to provide individualized focus on the character and circumstances of the defendant;

(b) Said statute fails to provide proper constitutional guidance for the exercise of prosecutorial discretion;

(c) Said statute has been upheld and applied by the Illinois Supreme Court under the doctrine of *stare decisis*, although a majority of the Illinois Supreme Court believes that the death penalty statute is unconstitutional on both state and federal constitutional grounds.

2. Whether the conviction and imposition of the death sentence in the Cornelius Lewis case were in violation of his right to effective assistance of counsel under the Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States because the defendant's court-appointed trial counsel afforded him inadequate representation, failing to protect the defendant's interests throughout the trial phase of the proceedings, and failed to assure Cornelius Lewis "individualized focus" during the sentencing phase.

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

Petitioner, Cornelius Lewis, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Supreme Court of the State of Illinois entered in this case on November 13, 1981. The defendant's timely filed Petition for Rehearing was denied by the Illinois Supreme Court on January 29, 1982.

OPINION BELOW

The opinion of the Supreme Court for the State of Illinois is reported at 88 Ill. 2d 129, 430 N. E. 2d 1346 (1981), and a copy is included in the Appendix as Exhibit A.

JURISDICTION

The petitioner's case arises under the Illinois Death Penalty Act, Chapter 38, Section 9-1 *et seq.*, Ill. Rev. Stat., under which the petitioner was indicted for murder. In additional counts of the indictment, the petitioner was charged with armed robbery and aggravated kidnapping. After a bifurcated trial pursuant to the Illinois Murder and Death Penalty Statute, Cornelius Lewis was convicted of the three offenses and the same jury that convicted him returned a death penalty verdict against him. The trial court entered judgment on this verdict and sentenced him to death.

A timely appeal was prosecuted to the Supreme Court of the State of Illinois where the petitioner asserted that his constitutional right to effective assistance of counsel was violated by the conduct and omissions of his court-appointed attorney in his trial, and that the Illinois Death Penalty Act was unconstitutional on its face and as applied to his case. His conviction was affirmed, and his timely petition for rehearing was denied on January 29, 1982. On February 2, 1982, the Illinois Supreme Court on its own motion stayed the petitioner's execution pending review by Petition for Writ of Certiorari to this Court, and a copy is included in the Appendix as Exhibit B.

Jurisdiction of the United States Supreme Court to review the decision of the Illinois Supreme Court by Petition for Writ of Certiorari is conferred by 28 U. S. C. § 1257 (3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant portions of the Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and the Illinois Death Penalty Act, Chapter 38, Section 9-1 *et seq.*, Ill. Rev. Stat., are set forth in the Appendix as Exhibit C.

STATEMENT OF THE CASE

Cornelius Lewis, a black man, his sister Bernice Lewis, and Willie Sangster were indicted in the Circuit Court of the Sixth Judicial Circuit, Macon County, Illinois, charged with murder, aggravated kidnapping, and armed robbery in connection with the armed robbery of the Citizen's National Bank in Decatur, Illinois on December 14, 1978.

Cornelius Lewis' court-appointed attorney, Kenneth Kinser, filed a pre-trial motion asserting that the Illinois Death Penalty Statute, Ch. 38, § 9-1 *et seq.*, Ill. Rev. Stat., was repugnant to the Eighth and Fourteenth Amendments to the Constitution of the United States, constituting cruel

and unusual punishment. The Macon County State's Attorney announced at pre-trial hearings that he was seeking the death penalty only as to Cornelius Lewis and not as to his sister Bernice, nor to the reputed mastermind of the crime, Willie T. Sangster. The trial judge, Champaign County Circuit Judge Robert Steigmann rejected Cornelius Lewis' attack upon the Illinois Death Penalty Statute. Although all three cases were consolidated for trial, only Bernice Lewis' and Cornelius Lewis' cases were tried in May, 1979, in Champaign County on change of venue.

At trial, bank tellers and other witnesses testified they observed two individuals approach a bank van early in the morning of December 14, 1978 at the Citizen's National Bank in downtown Decatur, Illinois. One of those individuals (who were described as two black males) entered the front passenger door of the van brandishing a long-barreled gun announcing the robbery. When the bank guard, who was also the van driver, Donald Bivens, went for his gun, the robber fired one shot, striking Bivens in the neck, killing him. The robbers then left the scene with three suitcases of money and banking materials.

Maurice Farris was a principal witness for the prosecution's case. Under a grant of complete immunity, he testified that he was the getaway driver involved in the scheme. The robbers, identified by him to be Cornelius Lewis and Bernice Lewis, rendezvoused with him at the Decatur Bus Station. The Lewis' were driving an automobile that had been taken by gun point from a Decatur woman at a local nursery school. The woman was bound and gagged and placed in the trunk of the car. The car was abandoned several blocks away from the bank, and

upon meeting Farris the Lewis' were driven to the residence of Margaret Morgan in Decatur. Farris testified that on the way to this residence Cornelius Lewis told him that the bank guard had gone for his gun and that Lewis had to shoot him.

Margaret Morgan stated that the Lewis' stayed with her for several days and that after the bank robbery she observed them with large amounts of money in her living room. She also described a conversation with Bernice Lewis in which Miss Lewis asked whether or not the bank guard who had been shot had died.

Cornelius Lewis was a resident of Minneapolis, Minnesota. At the end of December, 1978, he was taken into custody by federal parole authorities. FBI officers testified at his trial, and referred to seeing Cornelius Lewis in the presence of his probation officer. The Macon County Public Defender, representing Bernice Lewis, moved for mistrial and Cornelius Lewis' attorney, Kenneth Kinser, eventually joined in that motion. The trial court offered to grant a mistrial to Cornelius Lewis, conditioned upon later trial consolidated with Willie T. Sangster. Cornelius Lewis asserted that the charges against him should be dismissed and accordingly, the trial court denied mistrial.

Bernice Lewis' defense was that it was two males who had perpetrated the armed robbery, kidnapping and murder and therefore, it could not have been her. Her attorney adduced witnesses in support of this theory, and indicated that his client's defense was clearly antagonistic to the defense of Cornelius Lewis. In fact, in closing argument, the public defender told the jury that there was sufficient evidence for the jury to convict Cornelius Lewis.

Kenneth Kinser, on the other hand, presented no evidence and no defense for Cornelius Lewis. Cornelius Lewis' attorney stated that he was adopting Bernice Lewis' defense.

Cornelius Lewis' court-appointed attorney did not file a pre-trial motion *in limine* to attempt to keep out stale convictions of Cornelius Lewis as potential impeaching offenses if Lewis testified. Kinser failed to file a motion to suppress relating to a search of Lewis' apartment that resulted in the seizure of currency admitted against him. Kinser made only two general objections throughout the trial, and performed little cross-examination of the state's witnesses.

At the jury instruction conference Kinser failed to object to instructions that were improper, and failed to tender proper instructions; i. e., there was no instruction that the jury should not consider race to influence its decision, and no instruction was sought concerning the reference to Lewis' probation officer by the testimony of the FBI agent.

During the public defender's argument that there was sufficient evidence to convict Cornelius Lewis, Kinser was silent. The jury convicted Cornelius Lewis and his sister of murder, armed robbery, and aggravated kidnapping and the second stage of the bifurcated proceeding began as to Cornelius Lewis alone.

The state asserted that as an aggravating factor under the Illinois Death Penalty, Cornelius Lewis had killed Donald Bivens while committing the forcible felony of armed robbery. Under Illinois procedure, a jury must first conclude beyond a reasonable doubt that the state has

proved the aggravating factor. In arguing this factor to the jury, the state's attorney made misstatements, attributing statements to Cornelius Lewis that had been identified by witnesses as having emanated from Bernice Lewis, including the statement that occurred at Margaret Morgan's house inquiring as to whether the bank guard died. Kenneth Kinser did not object to these misstatements. In his phase of the argument, Kenneth Kinser virtually admitted that a gun that had been retrieved, although not specifically identified as the murder weapon, was the murder weapon. The jury concluded that an aggravating factor existed.

At the final stage, the mitigation phase, Cornelius Lewis' previous felony convictions were presented by the state. No evidence was presented about Cornelius Lewis by his attorney. The state's attorney argued that the failure of a jury in another murder case to impose the death penalty had a sort of causal relationship with the killing of Donald Bivens in the Lewis case. Kenneth Kinser did not object.

In his portion of argument, Kenneth Kinser made no argument about the individual characteristics and circumstances of Cornelius Lewis; he barely made mention of the argument that Donald Bivens was killed because he had gone for his gun, and that this presented a mitigating circumstance in the case; and he made no argument that the death penalty was not being sought for other equally culpable defendants in these prosecutions. Instead, he emphasized quotations from scripture, maintaining that it would be morally wrong to impose the death penalty. The

jury found no mitigating factors existed to prevent imposition of the death penalty.

The trial court imposed the death penalty on June 22, 1979, and set an execution date.

New counsel was appointed for Lewis in his automatic appeal to the Illinois Supreme Court pursuant to the Illinois Death Penalty Statute. On appeal, a Sixth Amendment constitutional claim regarding effective assistance of counsel as to attorney Kinser was made. Additionally, the Illinois Death Penalty Statute, on its face and as applied to Cornelius Lewis, was argued to be in violation of the Eighth and Fourteenth Amendments to the Constitution of the United States. The Illinois Supreme Court rejected these asserted constitutional failures in its written opinion affirming the convictions and death sentence of Cornelius Lewis.

In 1979, in a four to three decision, the Illinois Supreme Court had upheld the Illinois Death Penalty Statute, *People ex rel. Carey v. Cousins,* 77 Ill. 2d 531, 397 N. E. 2d 809 (1979). The dissenters in the case felt that the statute was unconstitutional because it gave unfettered discretion to prosecutors to seek the death penalty without proper constitutional standards, in violation of a defendant's right to due process of law under the Fourteenth Amendment to the Constitution of the United States, and because seeking a death penalty required judicial participation; hence, the statute violated the separation of powers under the Illinois State Constitution.

Those dissenters, Justices Goldenhersh, Ryan and Clark, were still on the court at the time of the decision in Cornelius Lewis' case. However, one of the *Cousins'* majority had left the court and a new justice, Justice

Simon, had come on the Illinois Supreme Court. In announcing its decision in Cornelius Lewis' case, the Illinois Supreme Court affirmed the imposition of the death penalty, although the concurring justices (the *Cousins* dissenters) made it clear that they felt bound by the doctrine of *stare decisis;* i. e., that the prior decision in the *Cousins'* case bound them, even though a majority of the Illinois Supreme Court felt that the Illinois Death Penalty Statute was unconstitutional. Justice Simon vigorously dissented.

A timely petition for rehearing was filed. It pointed out the error of the Illinois Supreme Court in failing to recognize the ineffective assistance of counsel rendered to Cornelius Lewis in this capital case, and asserted the arbitrary and capricious nature of the decision of the Illinois Supreme Court in applying the doctrine of *stare decisis* to allow the death penalty to stand. The petition for rehearing was denied on January 29, 1982.

REASONS FOR GRANTING THE WRIT

I.

The Illinois Death Penalty Statute fails to provide a proper individualized focus on the circumstances and character of the offender, and the decision below violates the defendant's right against the arbitrary and capricious infliction of the death penalty, as pronounced by this Court in Lockett v. Ohio, 438 U. S. 586 (1978) and Eddings v. Oklahoma, — U. S. —, 102 S. Ct. 869 (1982).

Furman v. Georgia, 408 U.S. 238 (1972) and its progeny announce constitutional principles upon which a valid death penalty sentence must be premised. Foremost among those principles is that there must be an individualized focus on the characteristics of the offender and the circumstances of the offense for a valid death sentence. Every criminal defendant facing death sanctions must be given the realistic opportunity to have his individuality, his human dignity, and the specific circumstances of his life given to the sentencing authority so that a full, fair, and intelligent decision can be rendered as to whether he should be sentenced to death.

Where, as in the present case, the sentencing authority is a jury that has heard all of the evidence surrounding the commission of the crime for which the defendant has been convicted, there is no difficulty to focus on the circumstances of the offense. But what if the jury in this situation is not given the factual grist for the individualized focus on the characteristics of the convicted defendant? If no such individualized characteristics and background are forthcoming, the limited and directed discretion given the jury takes on the aspects of a mandatory death penalty procedure condemned by the Court in *Woodson v. North Carolina,* 428 U.S. 280 (1976) and *Roberts v. Louisiana,* 428 U.S. 325 (1976). This Court was faced with an analagous situation in *Eddings v. Oklahoma,* — U.S. —, 102 S.Ct. 869 (1982).

In *Eddings,* the trial court was the sentencer. In pronouncing the death penalty upon a 16-year old defendant with a violent and troubled home background, the trial judge stated that the law forbade him from considering the youth's social history as a mitigating cir-

cumstance. The Oklahoma Court of Criminal Appeals agreed that this violent background could not be considered as a mitigating factor in making the death penalty determination. This Court held these rulings to be in violation of the Eighth and Fourteenth Amendments as pronounced in *Lockett v. Ohio,* 438 U.S. 586 (1978), stating:

> Just as a state may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer, refuse to consider, *as a matter of law,* any relevant mitigating evidence. In this instance, it was as if the trial judge had instructed a jury to disregard the mitigating evidence Eddings proferred on his behalf. The sentencer, and the Court of Criminal Appeals on review, may determine the weight to be given relevant mitigating evidence. But they may not give it no weight by excluding such evidence from their consideration.
>
> *Eddings v. Oklahoma,* — U.S. —, 102 S.Ct. at 875, 876 (Court's emphasis).

The concept of "individualized focus" is now carefully built into most states' death penalty procedures. Some death penalty statutes require the trial or appellate courts to make specific inquiry as to the jury's death penalty recommendation before accepting the death verdict. See, La. Code Crim. Proc., Art. 905.9.1; Mont. Code Ann. §95-2206.15; N.C. Gen. Stat., Art. 199, §15A-2000 (d)(2). Such provisions result in proportionality review by appellate courts—a comparison of cases in which death sentences were imposed (or not imposed) under a particular death penalty enactment; *e.g., State v. Rook,* 283 So. 2d 732, 752 (N.C., 1981); *State v. Williams,* 205 Neb. 56, 287 N.W. 2d 18, 29-30 (1979); and *State v. Williams,* 383 So. 2d 369, 375 (La., 1980). Unfortunately, no Illinois

statutory provision and no court rule expressly adopts such individualized focus or proportionality review.

However, in its own death penalty cases the Illinois Supreme Court has demonstrated the importance of having evidence of the individual circumstances of the defendant in the record and subject to review by that court. In *People v. Carlson,* 79 Ill. 2d 564, 404 N.E. 2d 233 (1980), and *People v. Gleckler,* 82 Ill. 2d 145, 411 N.E. 2d 849 (1980), the Illinois Supreme Court gave explicit demonstration of the need for required production of factual circumstances for individualized focus.

In *Carlson,* the defendant had murdered his ex-wife, set her home on fire, and within one hour shot and killed a policeman that came to arrest him. Mitigating evidence from a doctor about the defendant's physical and emotional background, and testimony about his family relationships led the Illinois Supreme Court to vacate the death penalty in his case, concluding:

> These mitigating circumstances do not bespeak a man with a malignant heart who must be permanently eliminated from society. The Supreme Court has held that, while individualized sentencing determinations generally reflects simply enlightened policy, in capital cases the fundamental respect for humanity underlying the eighth amendment "requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensible part of the process of inflicting the penalty of death."
>
> *People v. Carlson,* 79 Ill. 2d at 590, 404 N.E. 2d at 245. (Citations omitted.)

In *Gleckler,* the defendant brutally shotgunned two Champaign County teenagers. Evidence in mitigation

through his mother, a psychologist, and other social workers, established a personality disorder and alcoholism problems as a matter of record. The Illinois Supreme Court reviewed that record and again vacated the imposition of a death sentence, stating:

> [F]rom the record here, it can be seen that Gleckler, with no criminal history, the personality of a doormat, and a problem with alcohol, was not the ring leader in this sordid affair; nor are his rehabilitative prospects demonstrably poorer than those who received imprisonment terms. Our revulsion toward this crime and our lack of sympathy for Gleckler cannot justify executing only him.
>
> *People v. Gleckler*, 82 Ill. 2d at 171, 411 N. E. 2d at 861.

In the present case, the record is devoid of any evidence concerning individual characteristics of Cornelius Lewis, except the prior felony convictions adduced by the State of Illinois. For the most part, this was because the defendant was represented by an unskilled attorney who did not have a minimal understanding of the death penalty law; but, in a larger sense, it was also because the Iliinois Death Penalty Statute and indeed, the criteria handed down by this Court, have failed to *require* that personal background and individual characteristics be adduced for consideration by the sentencing body, or by a higher court on review. This is a fatal flaw in the Illinois Death Penalty Statute and in the constitutional standards required by this Court for proper "individualized focus". The same constitutional flaw exists in most state death penalty statutes.

It is not enough that a death penalty statute, as the Illinois Death Penalty Statute does, *permits* the introduction of individualized characteristics. A death penalty statute must *require* their production and utilization by

the sentencing body. Some states currently accomplish such an individualized focus by requiring a pre-sentence report to be utilized by the sentencing authority, or by a judge that imposes a death penalty or prison sentence after a jury verdict in a bifurcated proceeding; *e.g.,* Idaho Code § 18-4505(3); Ohio Rev. Code Ann. § 2929.03(D) (Page 1975); and Va. Code § 19.2-264.5.

In short, there was no individualized focus in the case of Cornelius Lewis' death sentence. The jury could provide no such focus because it had no factual information—Lewis' attorney provided none, and there was no procedure under the Illinois statute to give the jury the information necessary to make that focus. Nor was there any investigative report required by the Illinois Death Penalty Statute before the trial judge acted on the jury's verdict and imposed the death sentence in this case.

There was no data sheet or other compilation of information by the trial judge for transmittal to the Illinois Supreme Court for proportionality review or any other purpose. The Illinois Supreme Court did not review the individual characteristics of Cornelius Lewis because they did not appear in the record. This stands in stark contrast to the gleaning of the record in *Glecker* and *Carlson* where the Illinois Supreme Court vacated death sentences. Indeed, the Illinois Supreme Court has held that neither proportionality review nor individualized findings are constitutionally required under the Illinois Death Penalty Statute. *People v. Brownell,* 79 Ill. 2d 508, 541-544, 404 N. E. 2d 181, 198-199 (1980).

Surely if the holding in *Eddings v. Oklahoma* requires a sentencer to listen, the Eighth and Fourteenth Amendments must require individualized information be adduced. The Illinois Death Penalty Statute, on its face and as

applied in this case, has resulted in the arbitrary and capricious imposition of a death sentence against Cornelius Lewis. Certiorari should be granted.

II.

The invocation of the doctrine of stare decisis to permit a death sentence to stand is in itself arbitrary and capricious under the Eighth and Fourteenth Amendments to the Constitution of the United States.

The Illinois Supreme Court has seven members. Four of that seven have expressed the view that the Illinois Death Penalty Act is unconstitutional—a majority of the Illinois Supreme Court. Nevertheless, three of that four, relying on *stare decisis* ("to abide by, or adhere to, decided cases", Black's Law Dictionary 1577 [4th Ed., 1951]) would allow Cornelius Lewis to be executed by the State of Illinois.

Former Chief Justice Goldenhersh described his resolution of the dilemma as follows:

> If this court were the final tribunal to determine the validity of the statute in its present form I would continue to dissent in the hope that ultimately a majority of the court would agree or that the General Assembly might be persuaded to effect the amendments which I consider necessary to render the statute valid. In this situation, however, the Supreme Court can grant *certiorari* and decide the questions on which this court is divided.
>
> *People v. Lewis,* 88 Ill. 2d at 166, 430 N. E. 2d at 1364 (Goldenhersh, J. concurring).

There is a higher law than the judge-made doctrine of *stare decisis.* For almost two centuries, that higher law has existed for the protection of criminal defendants

in the American judicial system—the Bill of Rights to the Constitution of the United States. The guaranteed rights of such defendants have been expanded over the years by the constitutional interpretations of this Court in its decisions. *Stare decisis* is indeed a poor substitute, a poor excuse, for a state supreme court justice to fail to adhere to individual conviction about matters of constitutional principle and significance. This is especially true where capital punishment hinges upon the case result. See Douglas, *Stare Decisis,* 49 Colum. L. Rev. 735, 736-37 (1949). As this Court stated in *Helvering v. Hallock*:

> We recognize that stare decisis embodies an important social policy. It interprets an element of continuity in law, and is rooted in the psychologic need to satisfy reasonable expectations. But stare decisis is a principle of policy and not a mechanical formula of adherence to the latest decision, however recent and questionable, when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience.
>
> *Helvering v. Hallock,* 309 U.S. 106 at 119.

Is it not freakish, illogical, arbitrary and capricious for three state supreme court justices to assume the United States Supreme Court will grant certiorari in a death penalty case to answer a constitutional question that has divided that state supreme court? That this event has occurred makes Cornelius Lewis' death sentence cruel and unusual, and denies him due process of law under the Eighth and Fourteenth Amendments to the Constitution of the United States.

The bizarre use of *stare decisis* to permit a man to be executed should not be countenanced by this Court. Certiorari should be granted.

III.

The Illinois Death Penalty Act is invalid on its face because it lacks necessary standards to assure its evenhanded application by prosecutors across the State of Illinois, in violation of the Eighth and Fourteenth Amendments to the Constitution of the United States.

This Court has placed much constitutional emphasis on the need for limited, yet directed discretion in the imposition of death sentences under principles of the Eighth and Fourteenth Amendments to the Constitution of the United States. *Gregg v. Georgia,* 428 U.S. 153 (1976); *Lockett v. Ohio,* 438 U.S. 586 (1978); *Eddings v. Oklahoma,* — U.S. —, 102 S. Ct. 869 (1982). As a result the Court has scrutinized many different aspects of death penalty procedure to assure freedom from arbitrary and capricious death sentences. *Gardner v. Florida,* 430 U.S. 349 (1977), (improper use of presentence report); *Lockett v. Ohio,* 438 U.S. 586 (1978), (statute with limited mitigating factors); *Beck v. Alabama,* 447 U.S. 625 (1980), (failure to give instructions for lesser-included offense); and *Bullington v. Missouri,* 451 U.S. 430 (1981), (double jeopardy in attempted resentencing).

Cornelius Lewis' case presents an additional inquiry regarding the exercise of discretion, because the Illinois Death Penalty Act on its face gives prosecutors complete discretion in deciding whether to seek the death penalty against any given defendant. The statute requires death penalty consideration only when the prosecutor seeks it, yet gives no definitive standards as to how that decision must be made. Economic reasons, political ramifications,

heavy publicity, and pure whim, caprice, and emotion are available factors for prosecutors to utilize in each of the 102 Illinois counties to commence death penalty proceedings.

The signal cases of this Court cannot tolerate such unlimited individual decision-making power. A death penalty statute must have some articulated standards to guide prosecutors and protect from abuse or misuse. Where, as here, such standards are lacking, the death penalty statute in question must be struck down as repugnant to the Eighth and Fourteenth Amendments to the Constitution of the United States. See *People ex rel. Carey v. Cousins*, 77 Ill. 2d 531, 544, 397 N. E. 2d 809, 816 (Ryan, J. dissenting).

Unbridled discretion in the prosecutor to seek the death penalty, with no guiding standards, renders the Illinois death penalty system cruel and unusual. Certiorari should be granted.

IV.

This Court should determine a minimal standard of competence in a capital case under the Sixth, Eighth, and Fourteenth Amendments to the Constitution of the United States.

In *Gideon v. Wainwright*, 372 U. S. 335 (1963), this Court held that the Sixth Amendment right to assistance of counsel was made obligatory on the states by the Fourteenth Amendment. Subsequently, this Court has recognized that mere appointment of an attorney is not enough. The attorney must provide adequate assistance, and if he fails to do so a state criminal defendant's right to assistance of counsel under the Sixth and Fourteenth Amend-

ments has been denied. *Cuyler v. Sullivan*, 446 U. S. 335 (1980), *McMann v. Richardson*, 397 U. S. 759 (1970).

This Court has never enunciated any clear constitutional standard for use in evaluating a claim of ineffective assistance of counsel, either in a capital case or otherwise. In two cases involving federal collateral attacks on convictions based upon guilty pleas rendered with the advice of counsel, this Court has asked "... whether that advice was within the range of competence demanded of attorneys in criminal cases." *McMann v. Richardson*, 397 U. S. 759, 772 (1970), *Tollett v. Henderson*, 411 U. S. 258, 266 (1973). However, as noted by the Eighth Circuit in *McQueen v. Swenson*, 498 F. 2d 207, 214 (8th Cir., 1974), the courts have generally been "left without guidance". Dissenting from the denial of certiorari in *Morial v. Judiciary Commission of Louisiana*, 435 U. S. 1013 (1978), Justices White and Rehnquist recognized that a determination of the minimum standard of competence required under the Sixth Amendment is a question of "fundamental importance to the administration of criminal justice in both the state and federal courts" which this court should resolve.

The states are in total disarray in their efforts to determine the constitutional standard to be applied in considering whether the assistance of counsel was effective. Approximately ten different standards exist within the fifty states, with the test of whether the trial was reduced to a farce, mockery, or sham still commanding adherence in thirteen states; *e. g. State v. Tison*, 129 Ariz. 546, 633 P. 2d 355 (1981). At least four of those states have utilized that test in sustaining death penalties within the last several years.

Various formulations of a reasonableness test have been utilized by a number of states. Seven states have

seized upon the *McMann* standard, requiring counsel to "be within the range of competence demanded of attorneys in criminal cases; *e. g. Osborne v. Commonwealth*, 389 N. E. 2d 981 (Mass., 1979)." Eight other states have utilized a "reasonably effective assistance" type test; *e. g. Spilman v. State*, 633 P. 2d 183 (Wyo., 1981). Six states have focused on whether counsel was "reasonably likely to render and did render reasonably effective counsel"; *e. g. Solomon v. State*, 247 Ga. 27, 277 S. E. 2d 1 (1981), cert. denied 451 U. S. 1011 (1981); and two states have used the standard of a "reasonably competent attorney acting as a diligent advocate", requiring that acts or omissions of counsel result in a "withdrawal of a potential meritorious defense"; *e. g. People v. Frierson*, 25 Cal. 3d 142, 599 P. 2d 587 (Cal., 1979).

Other state court tests utilized ask the question whether trial counsel performed at least as well as a lawyer with ordinary training and skill in the criminal law area (four states), *e. g. State v. Rust*, 208 Neb. 320, 303 N. W. 2d 490 (1981); whether under all the circumstances of the case the defendant was afforded genuine and effective representation (two states), *e. g. Derrickson v. State*, 406 A. 2d 405 (Del., 1979); whether, after considering the entire record, it can be said the accused was afforded effective representation and a fair and impartial trial (two states), *e. g. State v. Nabozny*, 54 Ohio St. 2d 195, 375 N. E. 2d 784 (1978); and, whether the court is able to conclude that the particular course chosen by counsel had some reasonable basis designed to effectuate his client's interest (one state), *Commonwealth v. Johnson*, 416 A. 2d 485 (Pa., 1980). Approximately four states appear to have unsettled or mixed tests, *e. g. People v. Blalock*, 592 P. 2d 406 (Colo., 1979).

The test applied by the Supreme Court of Illinois in examining petitioner's allegations of incompetent counsel is unique among the fifty states. The test was:

> In order to establish incompetency of appointed counsel, the defendant is required to establish actual incompetence of counsel, as reflected by the manner of carrying out his duties as a trial attorney, which results in substantial prejudice without which the outcome would probably have been different.
>
> *People v. Lewis*, 88 Ill. 2d at 154, 430 N. E. 2d at 1357 (quoting from *People v. Carlson*, 79 Ill. 2d 564, 584-585, 404 N. E. 2d 233, 242).

Although the petitioner urged the Supreme Court of Illinois to adopt a higher standard in both the guilt phase and the penalty phase because of the capital nature of the case, it refused to do so.

The federal circuit courts have also adopted a variety of standards, although most of them have recently moved away from the farce, sham, and mockery test. Only the Second Circuit appears to still retain that test, *Rickenbacker v. Warden*, 550 F. 2d 62 (2nd Cir., 1976), cert. denied 434 U. S. 826 (1977). The First and Fourth Circuits require that defense counsel's "representation be within the range of competence expected or demanded of attorneys in criminal cases", *United States v. Bosch*, 584 F. 2d 1113 (1st Cir., 1978); *Marzullo v. State of Maryland*, 561 F. 2d 540 (4th Cir., 1977), cert. denied 435 U. S. 1011 (1978). The Third Circuit requires that "counsel exercise the customary skill and knowledge which normally prevails at the time and place", *United States v. Williams*, 631 F. 2d 198 (3rd Cir., 1980). The Fifth and Sixth Circuits use a "reasonably likely to render and rendering reasonably effective assistance" test, *Washington v. Watkins*, 655 F. 2d 1346 (5th Cir., 1981); *Wilson v. Cowan*, 578 F. 2d 166 (6th Cir., 1978); while the Seventh and Eighth Circuits use a

"minimum standard of professional representation test", *U.S. ex rel. Williams, v. Twomey,* 510 F.2d 634 (7th Cir., 1975); *Ford v. Parratt,* 638 F.2d 1115 (8th Cir., 1981); although the Eighth Circuit requires proof of prejudice. The Ninth Circuit requires "reasonably competent and effective representation", while requiring prejudice to be shown, *Brown v. United States,* 625 F.2d 210 (9th Cir. 1979). The Tenth Circuit requires that defense counsel "exercise the skill, judgment and diligence of a reasonably competent defense attorney", *Dyer v. Crisp,* 613 F.2d 275 (10th Cir., 1980), cert. denied 445 U.S. 945 (1980). Finally, the test utilized by the District of Columbia Circuit appears to depend upon the particular panel of judges. A test requiring the "reasonably competent assistance of an attorney acting as a diligent and conscientious advocate" and incorporating the American Bar Association standards for the defense function has been utilized, *United States v. DeCoster,* 487 F.2d 1197 (D.C. Cir., 1973); so has one requiring the defense attorney to "advocate fearlessly and effectively", *United States v. Barnes,* 662 F.2d 777 (D.C. Cir. 1980).

While the need for a uniform minimal competency standard for examining the performance of defense counsel is evident, the necessity for such a standard in a capital case is even more compelling. The qualitative difference between death and any other form of punishment is such that the reliability of both the guilt determination and the sentencing determination must be insured. *Beck v. Alabama,* 447 U.S. 625 (1980). Where a criminal defendant's representation is concerned, the only way to insure the reliability of the guilt determination and the sentencing determination is for this court to promulgate a uniform objective standard under the Sixth, Eighth, and Fourteenth Amendments to guide the state and federal

courts. Petitioner would suggest that, in a death penalty case, the minimal standard should be whether defense counsel exercised the skill, judgment, and diligence of a reasonably competent and experienced criminal defense attorney. No requirement of a showing of prejudice should exist, with prejudice being presumed upon a showing that the applicable standard has not been met.

The performance of Lewis' trial attorney makes this case an appropriate one for this Court's consideration. Mr. Kinser virtually abandoned petitioner during the trial, making no opening statement, conducting limited cross-examination and argument, and making only two general objections during the course of the trial. The record was clear that petitioner did not testify because of the existence of three prior convictions which counsel felt would be used for impeachment purposes, yet all of those convictions were dated ten years or more prior to the time of trial. Illinois has adopted Federal Rule 609 of the Federal Rules of Criminal Procedure on the use of prior convictions for impeachment purposes.

The omissions of petitioner's trial attorney, together with his performance during a conditional mistrial situation, his adoption of the inconsistent defense of Bernice Lewis, and his failure to either object or seek a mistrial when the public defender argued that Cornelius Lewis was guilty, all indicate the lack of competence and experience of counsel in the area of criminal defense.

It is interesting to note that at least two states have statutes requiring experienced defense counsel to be appointed in capital cases. South Carolina requires the appointment of two attorneys, one with at least five years experience as a licensed attorney and the other with at least three years experience in the actual trial of felony

cases. S. C. Code Ann. § 16-3-26 (B). Alabama requires that counsel having at least five years prior experience in the active practice of criminal law be appointed in a capital case. Ala. Code § 13A-5-37 (1975).

Mr. Kinser made devastating errors in the death penalty hearing. During arguments in the aggravation phase, he allowed the state's attorney to attribute statements made by petitioner's sister to petitioner, without objection. Counsel also admitted that the gun in evidence was the murder weapon, when it had never been conclusively proved to be the weapon. During the mitigation phase, he failed to present any evidence about Cornelius Lewis, failed to tender instructions, and did not object to prejudicial argument concerning the failure of another jury in another case to impose the death penalty. He also made little argument to emphasize that petitioner was merely responding to the fact that the bank guard reached for his gun.

At the least, this Court must promulgate a standard to be applied to the penalty phase of a capital case. *Eddings v. Oklahoma,* — U.S. —, 102 S.Ct. 869 (1982), requires no less. If a statute is considered constitutionally drawn to provide for the necessary individualized focus, that constitutional protection is meaningless if counsel for the defendant fails to utilize the statute. As stated above, Mr. Kinser presented absolutely no evidence in mitigation, not even a social or family background. Indeed two state courts have recognized the importance of the role of counsel in the sentencing phase of a capital case.

In *People v. Frierson,* 25 Cal. 3d 142, 599 P. 2d 587 (1979), the California Supreme Court found that a defendant had been denied effective assistance of counsel where

his counsel failed to present any mitigating evidence in the death penalty phase. In *State v. Myles*, 389 So. 2d 12 (La., 1980), the Supreme Court of Louisiana explicitly recognized that a high standard of competency is required in the penalty phase of a capital case. *Myles* was convicted of first degree murder and sentenced to death by the jury after a penalty hearing. The Louisiana Supreme Court reversed the defendant's death sentence and remanded for a new sentencing hearing with different counsel. Approving the incorporation of the ABA standards relating to the administration of criminal justice, the defense function, the court adopted the standard of *United States v. DeCoster*, 487 F. 2d 1197 (D. C. Cir. 1973):

> A person convicted of an offense punishable by death is entitled at his sentencing hearing to the reasonably competent assistance of an attorney acting as a diligent, conscientious advocate for his life.
>
> *State v. Myles*, 389 So. 2d at 28.

The *Myles* court reached the standard after observing that the case was a capital case and that death was qualitatively different from a sentence of imprisonment. Citing *Lockett v. Ohio*, 438 U. S. 586 (1978), *Gardner v. Florida*, 430 U. S. 349 (1977), and *Woodson v. North Carolina*, 428 U. S. 280 (1976), the court referred to the need for reliability in the jury's determination that death is the appropriate punishment in a specific case. No prejudice was required to be shown by the court.

As was the case in *Myles*, Cornelius Lewis' trial counsel admitted the existence of an aggravating factor. He also failed to present evidence to provide individualized focus. In short, his advocacy for petitioner's life was virtually non-existent.

CONCLUSION

This death penalty case presents issues of recurring national significance and importance. The role of counsel to provide effective representation in a capital case is a vital one that should receive intense examination by this Court. Further, required "individualized focus" in state death penalty statutes will greatly advance the growing stability of such statutes.

The combination of these issues warrants this Court's attention and a grant of certiorari to resolve these important questions.

Respectfully submitted,

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Counsel for Petitioner

March, 1982

Appendix

APPENDIX

EXHIBIT A

(No. 52338.—Judgment affirmed.)

THE PEOPLE OF THE STATE OF ILLINOIS, Appellee, v. CORNELIUS LEWIS, Appellant.

Opinion filed November 13, 1981.—Rehearing denied January 29, 1982.

GOLDENHERSH, C.J., and RYAN CLARK, and MORAN, JJ., concurring.

SIMON, J., dissenting.

Appeal from the Circuit Court of Macon County, the Hon. Robert J. Steigmann, Judge, presiding.

J. Steven Beckett and Glenn A. Stanko, of Reno, O'Byrne & Kepley, of Champaign, for appellant.

Tyrone C. Fahner, Attorney General, of Springfield, and Patrick Walsh, State's Attorney, of Decatur (Melbourne A. Noel, Jr., Susan M. Sherwin, and Neal B. Goodfriend, Assistant Attorneys General, of Chicago, of counsel), for the People.

JUSTICE UNDERWOOD delivered the opinion of the court:

Cornelius Lewis (defendant) and his sister, Bernice Lewis, were indicted for armed robbery, aggravated kidnaping, and murder in connection with the December 14, 1978, robbery of the Citizens National Bank in Decatur, during which Donald Bivens, a bank security guard, was shot and killed. Willie Sangster, a Decatur resident, was separately charged with the same crimes. The three defendants requested and obtained a change of venue to

Champaign County, where, in a separate jury trial, defendant and his sister were found guilty of the crimes. Defendant was sentenced to death as a result of a jury verdict and has appealed directly to this court. Ill. Const. 1970, art. VI, sec. 4(b); 73 Ill. 2d R. 603.

The testimony of the principal witnesses was as follows. Jodi Myers testified that, at 6:45 a.m. on the morning of the crime, she noticed two or possibly three persons in a maroon Monte Carlo automobile in the parking lot of the day-care center where she worked. As she walked near the Monte Carlo, a black man seated in the driver's seat (whom she later identified from a lineup as Maurice Farris) lowered his sun visor.

Mary Comerford testified that, after delivering her child to the same day-care center, she returned to her car, noticing two black persons in a maroon Monte Carlo parked next to her white Mercury automobile. When she entered her car, a black man wearing a ski mask appeared in her back seat and forced her to drive away, eventually taping her eyes and hands and placing her in the trunk of the Mercury.

Kaye Pinkley, a teller at the Citizens National Bank, testified that decedent Bivens normally drove a van with five tellers from the bank's parking garage to an auto-banking facility. Shortly before 8 a.m. on December 14, as decedent was about to start the van in which the tellers were seated, a tall black man pulled the right front door open, leaned his elbows on the witness's legs, ordered the tellers to remain silent, and shot decedent, as the latter apparently reached for his gun. Then the gunman and another robber took three of the tellers' five briefcases

containing money for the day and banking paraphernalia, ran to a light-colored Mercury and drove away. Teller Pinkley and two other tells later identified items recovered from the Macon County landfill as items which had been in their briefcases that morning.

Mr. and Mrs. Joseph Dennis from rural Macon County stated that, while sitting in their car near the Citizens National Bank, they saw two blacks park Mrs. Comerford's Mercury, enter the bank's parking garage, later return to the Mercury, with three black briefcases, and drive off. Gail Thompson, a florist, saw a black man or person dressed as a man, carrying a black briefcase in the vicinity of the parking lot near the bus station, where Norman Goenne, an office worker, saw the driver in a maroon Monte Carlo, waiting with the engine running, at around 7:45 a.m.

Maurice Farris testified that he and Willie Sangster (who according to the prosecution's theory was the mastermind of the robbery) surveyed the Citizens National Bank and the route to the home of Margaret Morgan, where defendant apparently was staying. On two mornings, Farris observed the tellers' routine. Sangster introduced defendant and his sister (using the names "Denise" and "Mingo") to Farris, who at trial estimated the sister's height as 5 feet 11 inches, defendant's as over 6 feet and his own as 5 feet 8 inches. The Lewises and he discussed plans for the robbery of the bank. Farris was to drive the car, the Lewises were to do the actual robbing, and Sangster was to get $10,000 "off the top" the day after the robbery, apparently for his role in planning. On the morning of December 13, when they had intended to carry out the plan, the Lewises and Farris were unable to steal a car for use in the robbery, but they did observe the tellers'

routine and drove along the route to Mrs. Morgan's. The next morning defendant and his sister, with Farris driving, went to the day-care center in the Monte Carlo looking for a car to steal. Maurice lowered his sun visor to avoid being identified. Defendant left the car and concealed himself in the back seat of Mrs. Comerford's Mercury. When she entered the car he forced her to drive away and eventually took control of her car, forcing her to get into the trunk. Defendant's sister then left Farris in the Monte Carlo, which had accompanied the Mercury, and sat on the passenger side of the front seat of the Mercury. Farris drove to a parking lot near the bus station, got some coffee at about 7:40, and waited with the motor running until defendant and his sister rejoined him, carrying one and two briefcases respectively. The Lewises concealed themselves on the floor of the maroon Monte Carlo. On the drive to Mrs. Morgan's, a siren prompted comments by the sister, and defendant stated, "The guard went for his gun. I had to burn him." Except for the possibility of a perjury prosecution, Farris received total immunity in return for his testimony.

Mrs. Morgan testified that the Lewises had stayed with her beginning on December 12, 1978. On the morning of December 14, at about 8:05 or 8:10 a.m., she observed the defendants with three black briefcases. She asked Bernice Lewis whether Bernice knew that the bank had been robbed, to which Bernice, with defendant present, replied, "Did he die?" Later that morning Mrs. Morgan saw both Lewises counting a large quantity of money on her coffee table, with black briefcases and "blank money orders from the bank and money wrappers" present. Defendant gave Mrs. Morgan a paper sack to take to Willie Sangster at

Jelk's Barbarship [sic], where he worked. Later that day, Bernice Lewis and Mrs. Morgan went to a deteriorated section of Decatur to dispose of the black briefcases and a garbage bag containing two handguns, money wrappers, and other miscellaneous items. Subsequently Mrs. Morgan and two neighbors moved these things from the garbage cans, where Bernice Lewis and she had put them, to a "dumpster." Mrs. [sic] Mrs. Morgan, Shirley Brummet (a neighbor), and the Lewises drove to the Davenport, Iowa, bus station, where defendant and his sister caught the bus to Des Moines. Mrs. Morgan eventually turned over to the FBI some money which she said included that given her by defendant. Mrs. Morgan testified that she discovered a .357-Magnum handgun, which a ballistics expert indicated could have fired the bullet which killed decedent, under a mattress in the room in which the Lewises had been staying. She stated she observed the gun during a January 25 FBI consent search of the room when the agents lifted the foot of the mattress on the bed. According to her testimony the gun was located near the head of the bed and was not seen by the agents. She did not then mention the gun to them but later that day took it to a friend's home from which the agents later recovered it at her direction. The agents both testified that only the lower corners of the mattress were lifted and they did not observe the gun. On January 31 Mrs. Morgan did give to FBI agents five live rounds of .357-caliber ammunition which she had earlier removed from the gun.

Barbara Rigney (one of Mrs. Morgan's children) and Florida Eubanks and Shirley Brummet (two neighbors) testified that Bernice and Cornelius Lewis had been staying at Mrs. Morgan's in mid-December, 1978. Wyonia

Adams, another neightbor [sic], testified that she and Shirley Brummet had moved garbage bags containing guns and miscellaneous items from a trash can to a "dumpster." Shirley Brummet testified that, on December 14, she had traveled with the Lewises and Mrs. Morgan, to the Davenport, Iowa, bus station. Officer McQuaid, of the Decatur police, testified that he observed a black lady carrying a sack into Jelk's Barbarshop on the morning of December 14, 1978.

Defendant's brother-in-law, Dwight David, testified that in late December 1978 defendant had asked him to keep a box which contained money. After he heard that defendant had been arrested, David took the money from the box, put it in a bag, and asked a friend, Mrs. Bradford, to hold it for him. He later retrieved it, and gave it, still in the bag, to the FBI, together with the box from which he had taken it. FBI Agent Ryan testified that new $20 bills with serial numbers G21536201A through G21536247A were included in the money turned over by David. Daniel Kinsella, an official of the Federal Reserve Bank, testified that numbers written on the back of a form (Exhibit 80) indicated that $20 notes with serial numbers G21536001A through G21540000A were in a shipment of currency which had been sent to the Citizens National Bank in Decatur.

Lee Jarombeck, an employee of a Minnesota car dealer, testified that defendant had rented from him the maroon Monte Carlo which had been observed in the day-care lot and eventually recovered from Farris' garage.

Defendant offered no testimony, adopting Bernice Lewis' case, which primarily emphasized Mrs. Comerford's lineup identification of Farris as her kidnapper, and teller

King's positive statements to Decatur police officers that the robbers were both male.

Defendant asserts numerous errors, the resolution of which requires reference to the Illinois death penalty statute (Ill. Rev. Stat. 1977, ch. 38, par. 9—1). In relevant part it provides:

> "Sec. 9—1. Murder—Death Penalties—Exceptions—Separate Hearings—Proof—Findings—Appellate Procedures—Reversals.
>
> • • •
>
> (b) Aggravating Factors. A defendant who at the time of the commission of the offense has attained the age of 18 or more and who has been found guilty of murder may be sentenced to death if:
>
> • • •
>
> 6. the murdered individual was killed in the course of another felony if:
>
> (a) the murdered individual was actually killed by the defendant and not by another party to the crime or simply as a consequence of the crime; and
>
> (b) the defendant killed the murdered individual intentionally or with the knowledge that the acts which caused the death created a strong probability of death or great bodily harm to the murdered individual or another; and
>
> (c) the other felony was one of the following: armed robbery, robbery, rape, deviate sexual assault, aggravated kidnapping, forcible detention, arson, burglary, or the taking of indecent liberties with a child; or
>
> • • •

(c) Consideration of factors in Aggravation and Mitigation. The court shall consider, or shall instruct the jury to consider any aggravating and any mitigating factors which are relevant to the imposition of the death penalty. Aggravating factors may include but need not be limited to those factors set forth in subsection (b). Mitigating factors may include but need not be limited to the following:

1. the defendant has no significant history of prior criminal activity;

2. the murder was committed while the defendant was under the influence of extreme mental or emotional disturbance, although not such as to constitute a defense to prosecution;

3. the murdered individual was a participant in the defendant's homicidal conduct or consented to the homicidal act;

4. the defendant acted under the compulsion of threat or menace of the imminent infliction of death or great bodily harm;

5. the defendant was not personally present during commission of the act or acts causing death.

(d) Separate sentencing hearing.

Where requested by the State, the court shall conduct a separate sentencing proceeding to determine the existence of factors set forth in Subsection (b) and to consider any aggravating or mitigating factors as indicated in Subsection (c). The proceeding shall be conducted:

1. before the jury that determined the defendant's guilt; or

2. before a jury impanelled for the purpose of the proceeding if:

A. the defendant was convicted upon a plea of guilty; or

B. the defendant was convicted after a trial before the court sitting without a jury; or

C. the court for good cause shown discharges the jury that determined the defendant's guilt; or

3. before the court alone if the defendant waives a jury for the separate proceeding.

(e) Evidence and Argument.

During the proceeding any information relevant to any of the factors set forth in Subsection (b) may be presented by either the State or the defendant under the rules governing the admission of evidence at criminal trials. Any information relevant to any additional aggravating factors or any mitigating factors indicated in Subsection (c) may be presented by the State or defendant regardless of its admissibility under the rules governing the admission of evidence at criminal trials. The State and the defendant shall be given fair opportunity to rebut any information received at the hearing.

(f) Proof.

The burden of proof of establishing the existence of any of the factors set forth in Subsection (b) is on the State and shall not be satisfied unless established beyond a reasonable doubt.

(g) Procedure—Jury.

If at the separate sentencing proceeding the jury finds that none of the factors set forth in Subsection (b) exists, the court shall sentence the defendant to a term of imprisonment under Chapter V of the Unified Code of Corrections. If there is a unanimous finding by the jury that one or more of the factors set forth in Subsection (b) exist, the jury shall consider aggravating and mitigating factors as instructed by the court and shall determine whether the sentence of death shall be imposed. If the jury determines unani-

mously that there are no mitigating factors sufficient to preclude the imposition of the death sentence, the court shall sentence the defendant to death.

Unless the jury unanimously finds that there are no mitigating factors sufficient to preclude the imposition of the death sentence the court shall sentence the defendant to a term of imprisonment under Chapter V of the Unified Code of Corrections.

* * *

(i) Appellate Procedure.

The conviction and sentence of death shall be subject to automatic review by the Supreme Court. Such review shall be in accordance with rules promulgated by the Supreme Court."

Defendant argues that this statute violates the eighth and fourteenth amendments to the United States Constitution in that greater consideration—a more "individualized focus"—on the personal characteristics of the defendant and the particular circumstances of the offense are required. The statute, however, is not restrictive. It provides, "The court * * * shall instruct the jury to consider any aggravating and any mitigating factors which are relevant to the imposition of the death penalty." (Ill. Rev. Stat. 1977, ch. 38, par. 9—1(c).) It does not limit the factors to be considered in mitigation, which "may include but *need not be limited to*" (emphasis added) (Ill. Rev. Stat. 1977, ch. 38, par. 9—1(c)), the factors outlined in section 9—1(c). Information relevant to those factors is admissible regardless of the rules of evidence in criminal trials. (Ill. Rev. Stat. 1977, ch. 38, par. 9—1(e); *People v. Gleckler* (1980), 82 Ill. 2d 145, 157; *People v. Carlson* (1980), 79 Ill. 2d 564, 589-90; *People v. Brownell* (1980), 79 Ill. 2d 508, 531-36; *People ex rel. Carey v. Cousins*

(1979), 77 Ill. 2d 31, 535, *cert. denied* (1980), 445 U. S. 953, 63 L. Ed. 2d 788, 100 S. Ct. 1603.) It is entirely clear that this court will require that consideration be given to any mitigating facts in the record of the trial (*People v. Carlson* (1980), 79 Ill. 2d 564, 589-90) as well as any which the defendant offers at the sentencing hearing (*Bell v. Ohio* (1978), 438 U. S. 637, 642, 57 L. Ed. 2d 1010, 1016, 98 S. Ct. 2977, 2980-81 (opinion of Burger, C. J.); *Lockett v. Ohio* (1978), 438 U. S. 586, 604-05, 57 L. Ed. 2d 973, 989-90, 98 S. Ct. 2954, 2964-65 (opinion of Burger, C. J.); *People v. Glecker* (1980), 82 Ill. 2d 145).

Defendant argues that the statutory phrase "no significant history of prior criminal activity," which is a mitigating factor suggested in section 9-1(c), is impermissibly vague. Similarly, he urges that the section 9-1(g) reference to mitigating factors "sufficient to preclude the imposition of the death sentence" cannot withstand constitutional scrutiny. While the "no significant history of prior criminal activity" phrase can, perhaps, be construed or applied by courts so as to render it overly broad, there is no reason to assume it will be. Even in the case of an aggravating factor, the Supreme Court has refused to invalidate language which need not be construed to be vague and overly broad. (*Gregg v. Georgia* (1976), 428 U. S. 153, 200, 49 L. Ed. 2d 859, 890, 96 S. Ct. 2909, 2938 (opinion of Stewart, J.).) Approval was there indicated of the Georgia Supreme Court's characterization of the phrase "substantial history of serious assaultive criminal convictions" as an impermissibly vague aggravating factor (*Gregg v. Georgia* (1976), 428 U. S. 153, 202, 49 L. Ed. 2d 859, 96 S. Ct. 2909, 2930 (opinion of Stewart, J.).) We do not, however, view that holding as

indicating any constitutional infirmity in the mitigating factor suggested by section 9-1(c)(1). Our statute does not contain the same degree of uncertainty inherent in the Georgia phrase "serious assaultive criminal convictions." Too, the suggestions of possible mitigating factors in section 9-1(c) serve a purpose different from that of aggravating factors. (See *Jurek v. Texas* (1976), 428 U.S. 262, 271-76, 49 L.Ed. 2d 929, 938-41, 96 S.Ct. 2950, 2956-58 (opinion of Stevens, J.), 428 U.S. 262, 277, 49 L.Ed. 2d 929, 941, 96 S.Ct. 2950, 2959 (opinion of White, J.); *Proffitt v. Florida* (1976), 428 U.S. 242, 257-58, 49 L.Ed. 2d 913, 925-26, 96 S.Ct. 2960, 2969 (opinion of Powell, J.); *Gregg v. Georgia* (1976), 428 U.S. 153, 221-22, 49 L.Ed. 2d 859, 901, 96 S.Ct. 2909, 2947 (opinion of White, J.).) Aggravating factors serve as necessary prerequisites without which the death sentence cannot be imposed; they delineate the borderline between those cases in which death is a possible punishment and those in which it cannot be considered; because of their manifest importance, their scope must be somewhat more precisely marked than the suggestions of mitigating factors which the jury may weigh in cases where the death sentence is a possibility. We believe the phrasing of section 9-1(c)(1) is not a constitutionally impermissible basis for calling to the jury's attention the absence of significant criminal convictions. (See *Godfrey v. Georgia* (1980), 446 U.S. 420, 426 n.4, 64 L.Ed. 2d 398, 405 n.4, 100 S.Ct. 1759, 1764 n.4 (opinion of Stewart, J.).) The argument that the words "sufficient to preclude imposition of the death sentence" in section 9-1(g) are impermissibly vague was rejected by this court in *People v. Brownell* (1980), 79 Ill. 2d 508, 531, 534. Also rejected were the contentions that a single statutory mitigating factor always precludes the

death penalty and that the appellate review provided by our statute is inadequate (79 Ill. 2d 508, 537-38, 541-44; See *Proffitt v. Florida* (1976), 428 U.S. 242, 257-58, 49 L. Ed. 2d 913, 926, 96 S. Ct. 2960, 2969 (opinion of Powell, J.); *Gregg v. Georgia* (1976), 428 U.S. 153, 203, 49 L. Ed. 2d 859, 891, 96 S. Ct. 2909, 2939 (opinion of Stewart, J.)). Similarly, this court has held that the discretion vested by our statute in the prosecutor does not violate the doctrine of separation of powers or the due process clause. *People v. Brownell* (1980), 79 Ill. 2d 508, 526-28; *People ex rel. Carey v. Cousins* (1979), 77 Ill. 2d 531, 534-44; see *Gregg v. Georgia* (1976), 428 U.S. 153, 199, 49 L. Ed. 2d 859, 889, 96 S. Ct. 2909, 2937 (opinion of Stewart, J.).

Defendant also urges that a second *voir dire* examination should routinely be conducted before the sentencing phase of a murder case in which the prosecutor seeks the death penalty. He appears to argue that a jury which has convicted a defendant is likely to be "so prejudiced against him as to have a preconceived notion that the death penalty should be imposed" and that this satisfies the statutory requirement of "good cause" for excusing the convicting jury and impaneling another jury to sentencing purposes. We do not agree. The defendant's theory would transform the statutory requirement of "good cause" into a virtually automatic provision that no jury which had heard the guilt phase could hear the sentencing phase. A system so generally providing a new jury for the sentencing phase would arguably be more vulnerable to constitutional attack since, under the present system, the same jury can, at the sentencing phase, consider the entire record, allowing a more perceptive and complete analysis of aggravating and mitigating factors,

even in cases where no evidence is presented in that phase by the defendant. *People v. Carlson* (1980), 79 Ill. 2d 564, 589-90; see *Jurek v. Texas* (1976), 482 U.S. 262, 271-72, 49 L.Ed. 2d 929, 938, 96 S.Ct. 2950, 2956 (opinion of Stevens, J.).

Defendant does not deny that a *voir dire* examination of this jury was conducted in accordance with *Witherspoon v. Illinois* (1968), 391 U.S. 510, 20 L.Ed. 2d 776, 88 S.Ct. 1770, but argues that qualifying the jury in compliance with *Witherspoon* rules results in a conviction-prone jury. The Supreme Court recently reversed a death sentence imposed by a jury selected in violation of *Witherspoon*, but let the conviction stand. (*Adams v. Texas* (1980), 448 U.S. 38, 65 L.Ed. 2d 581, 100 S.Ct. 2521.) Our holdings are to the same effect: qualifying a jury in violation of *Witherspoon* does not affect the validity of the conviction. (*People v. Wright* (1974), 56 Ill. 2d 523, 535; *People v. Clark* (1972), 52 Ill. 2d 374, 392-93; *People v. Brooks* (1972), 51 Ill. 2d 156, 167.) The studies now cited as supporting a contrary result involve very limited numbers and small variations in results. They are not persuasive of the allegation that qualifying a jury in accord with the principles of *Witherspoon* results in a jury biased in favor of conviction, and we adhere to our earlier holdings.

Defendant contends that due process is offended by the fact that a jury verdict indicating the death sentence should be imposed makes mandatory its imposition by the judge. It does not, says defendant, accord with due process to deny a trial judge the right to determine whether that verdict may stand in light of testimony here that decedent Bivens reached for his gun before defendant fired, a fac-

tor which defendant says section 9-1(c)(4) declares to be mitigating. Thus, it is argued, the jury mistakenly found no mitigating factor sufficient to preclude the death penalty existed, and the trial judge should have been free to sentence defendant to a term of imprisonment. We note that the trial judge, while indicating that he believed himself bound to follow the verdict, stated that, were it only a recommendation, he would have no hesitation in following it under the circumstances of this case. We believe, however, that had the legislature intended the mitigating factors specified in section 9-1(c) to preclude death, that intent would have been indicated as clearly as section 9-1(b) indicates that a single aggravating factor can support a death penalty. (See *People v. Brownell* (1980), 79 Ill. 2d 508, 537-38.) It is clear that maintaining a link between death sentences and contemporary community values has been thought desirable (*Gregg v. Georgia* (1976), 428 U.S. 153, 190, 49 L.Ed. 2d 859, 884, 96 S.Ct. 2909, 2933 (opinion of Stewart, J.); see also *Jurek v. Texas* (1976), 428 U.S. 262, 269, 49 L.Ed. 2d 929, 936-37, 96 S.Ct. 2950, 2955 (opinion of Stevens, J.)). That object is best achieved by a mandatory construction vesting a determination as to the propriety of the death penalty in the jury under specified circumstances, as our statute now provides.

There is no merit to the contention that the prosecutor's action in offering to recommend a 60-year sentence if defendant pleaded guilty, and seeking the death penalty when defendant elected to stand trial, penalized defendant for exercising his constitutional right to a jury trial. It is entirely clear that defendant knew death was a possibility when he chose to stand trial. There is here no indication

of a purpose to punish defendant for exercising his right to jury trial, as was the case in *People v. Moriarity* (1962), 25 Ill. 2d 565, nor allegations of prosecutorial vindictiveness as in *People v. Walker* (1981), 84 Ill. 2d 512. (See also *Bordenkircher v. Hayes* (1978), 434 U. S. 357, 54 L. Ed. 2d 604, 98 S. Ct. 663; *People v. McCutcheon* (1977), 68 Ill. 2d 101; *People v. Morgan* (1974), 59 Ill. 2d 276.) Unless we are willing to say that a prosecutor may never seek a penalty greater than that offered in plea discussions, defendant's argument here must fail, for his election to stand trial was made with a complete understanding of the hazards. *People v. Walker* (1981), 84 Ill. 2d 512.

Defendant argues that the prosecutor's closing argument in the sentencing phase was inflammatory and prejudicial in that it referred to the failure of a jury in another case to impose the death penalty shortly before the instant crime. It is also urged that the instructions and verdict forms used in that phase were improper. The fact that the record reveals no objection at trial as to either matter precludes these claims. *People v. Carlson* (1980), 79 Ill. 2d 564, 575-78; *People v. Underwood* (1978), 72 Ill. 2d 124, 129; *People v. Skorusa* (1973), 55 Ill. 2d 577, 585.

Even if not precluded, defendant's claims would not require reversal. The prosecutor's remarks, an effort to dramatize his belief in the deterrent effect of the death penalty, were not so inherently prejudicial that no instruction could have corrected the situation, had one been requested. Although reference to his personal experience in the other trial was inappropriate, the prosecutor could properly urge the imposition of death as a deterrent to murder. We do not view addition of the personal experience as influencing the verdict. (*People v. Clark* (1972),

52 Ill. 2d 374, 390; *People v. Nilsson* (1970), 44 Ill. 2d 244, *cert. denied* (1970), 398 U. S. 954, 26 L. Ed. 2d 296, 90 S. Ct. 1881.) Too, defense counsel may have believed an objection would overemphasize what the jury might otherwise believe to be an unreasoned argument.

Section 9-1(g) provides:

> "(g) Procedure—Jury.
>
> If at the separate sentencing proceeding the jury finds that none of the factors set forth in Subsection (b) exists, the court shall sentence the defendant to a term of imprisonment under Chapter V of the Unified Code of Corrections. If there is a unanimous finding by the jury that one or more of the factors set forth in Subsection (b) exist, the jury shall consider aggravating and mitigating factors as instructed by the court and shall determine whether the sentence of death shall be imposed. If the jury determines unanimously that there are no mitigating factors sufficient to preclude the imposition of the death sentence, the court shall sentence the defendant to death.
>
> Unless the jury unanimously finds that there are no mitigating factors sufficient to preclude the imposition of the death sentence the court shall sentence the defendant to a term of imprisonment under Chapter V of the Unified Code of Corrections." (Ill. Rev. Stat. 1977, ch. 38, par. 9—1(g).)

Defendant urges that reversible error is found in the failure of the court to instruct the jury that if it failed to agree that "there are no mitigating factors sufficient to preclude the imposition of the death sentence" the trial court, pursuant to the final paragraph of section 9—1(g), would impose a sentence of imprisonment. We note initially that there is no indication in this record that defendant either requested that the jury be so instructed or tendered an appropriate instruction.

The jury appears to have experienced little difficulty in deciding that there were no "mitigating factors sufficient to preclude death," returning that verdict in approximately one hour. Too, the judge, at the request of defense counsel, had the jury polled, a process (see *People v. Kellogg* (1979), 77 Ill. 2d 524) which normally reveals any overbearing of one juror by another. The jurors here could not have speculated whether defendant, if not sentenced to death, would go free since the sentencing phase instructions, unlike the guilt phase instructions in *Beck v. Alabama* (1980), 447 U.S. 625, 65 L.Ed. 2d 392, 100 S.Ct. 2382, made it clear that the defendant would be imprisoned even if a mitigating factor sufficient to preclude death were found. Similarly it seems likely the jurors would have realized that, since defendant would be imprisoned even if they found mitigating factors sufficient to preclude the death penalty were present, nothing less severe could result if they could not agree on the absence of those factors. This case, in our judgment, is unlike *Beck*, where ignorance of the effect of a mistrial added pressure to convict and interjected "irrelevant considerations" into the guilt determination process. *Beck v. Alabama* (1980), 447 U.S. 625, 642, 65 L.Ed. 2d 392, 406, 100 S.Ct. 2382, 2392.

Defendant urges that the prosecution failed to prove his guilt beyond a reasonable doubt. This court has stated that it will not disturb the jury's verdict of guilty unless the evidence is so unreasonable, improbable, or unsatisfactory as to justify a reasonable doubt of defendant's guilt. (*People v. Clark* (1972), 52 Ill. 2d 374, 387; *People v. Sustak* (1958), 15 Ill. 2d 115, 123; *People v. Horton* (1954), 4 Ill. 2d 176.) The United States Supreme Court has stated that the standard for reversing a jury's verdict

on the ground of insufficient evidence is identical to the test of whether to submit the prosecution's case to the jury:

> "The prevailing rule has long been that a district judge is to submit a case to the jury if the evidence and inferences therefrom most favorable to the prosecution would warrant the jury's finding the defendant guilty beyond a reasonable doubt. • • • Obviously a federal appellate court applies no higher a standard [in determining whether the evidence was insufficient to sustain guilt, i.e., whether the prosecution failed to prove guilt beyond a reasonable doubt]; rather, it must sustain the verdict if there is substantial evidence, viewed in the light most favorable to the Government, to uphold the jury's decision." *Burks v. United States* (1978); 437 U. S. 1, 16-17, 57 L. Ed. 2d 1, 13, 98 S. Ct. 2141, 2150.

See also *Glasser v. United States* (1942), 315 U. S. 60, 86 L. Ed. 680, 62 S. Ct. 457.

Defendant posits the theory that defendant and his sister were "set up" by Maurice Farris, Margaret Morgan, and Willie Sangster, among whom a conspiracy had existed to rob the bank, and who actually committed the crimes with which defendant and his sister were charged. Defense counsel cites as supporting this theory the fact that the results of a paraffin test apparently indicated burnt powder residue on Farris' left hand, thus suggesting that he had fired the fatal shot. Farris, however, testified he was right-handed. He testified that he had, when he returned the Lewises to Mrs. Morgan's house after the crime, lifted one of the suitcases out of the back seat of the Monte Carlo to give it to defendant. Farris testified that he was not wearing gloves at the time. Testimony of teller Carnahan indicated that the gunman had worn gloves

while firing at Bivens. The fact that Farris was granted immunity from prosecution also demonstrates, according to defendant, his self-interest and supports the conspiracy theory. Under that theory defendant was not in Decatur at the time of the robbery, although the Monte Carlo rented by him was conclusively shown to have been there. Defendant argues that this is explainable if the three conspirators stole the car from defendant while he was visiting his sister in Des Moines and brought it to Decatur, an explanation without support in this record. There is a further difficulty with defendant's present argument that his trial counsel was incompetent in not aggressively seeking to establish Farris as the killer. Farris was a short man, 5 feet 8 inches, whereas the bank tellers agreed the killer was over 6 feet tall. It seems quite improbable that defendant's situation would have been improved by the strategy now suggested.

It is apparent from this record that the reasonable-doubt issue is basically a question of credibility of the witnesses. If the jury believed, as it apparently did, the testimony of Margaret Morgan and Maurice Farris and other State witnesses, the proof of guilt is overwhelming. Corroboration for much of that testimony is to be found in the testimony of Gail Thompson, Norman Goenne, Shirley Brummet, Wyonia Adams, Florida Eubanks, Barbara Rigney, Lee Jarombek, and Officer McQuaid. There was also the damaging testimony of Dwight David, defendant's brother-in-law, and the testimony of four tellers which indicated that it was a tall robber who had leaned across Kaye Pinkley to shoot decedent. The Farris-Morgan testimony was also corroborated by other evidence. Fingerprints of Bernice and one of the tellers were found on the

money defendant gave Dwight David. Serial numbers of some of that money matched numbers of some of the bank's shipment of currency. A .38-caliber handgun, identified by the testimony of a Minnesota gun dealer and other witnesses as having been "pawned" to defendant, was found in the Macon County landfill in the area with decedent's gun and items identified by three of the bank tellers as having been in their briefcases on the morning of the murder. Telephone bills showed calls between Lewis residences in Minneapolis and Des Moines and the Morgan and Sangster-Farris residences in Decatur. An Illinois roadmap with defendant's fingerprint on it was found in the maroon Monte Carlo seized in Farris' garage, together with a billfold containing identification of "Denise" Lewis. In our judgment the evidence of guilt, if believed by the jurors, was ample.

Defendant claims that the performance of his trial counsel was so inadequate as to deny him effective assistance of counsel in violation of the sixth and fourteenth amendments to the United States Constitution. This court has often stated the test applied to the performance of appointed counsel:

> "In order to establish incompetency of appointed counsel, the defendant is required to establish actual incompetence of counsel, as reflected by the manner of carrying out his duties as a trial attorney which results in substantial prejudice without which the outcome would probably have been different." (*People v. Carlson* (1980), 79 Ill. 2d 564, 584-85.)

(See *People v. Greer* (1980), 79 Ill. 2d 103, 120-24; *People v. Hills* (1980), 78 Ill. 2d 500, 505-07; *People v. Morris* (1954), 3 Ill. 2d 437, 449.) Arguments that a different test should be adopted have been rejected. *People v. Greer* (1980), 79 Ill. 2d 103, 121.

Public Defender Scott Diamond of Macon County had originally been appointed to represent both defendant and his sister. Attorney Diamond subsequently sought and was granted leave to withdraw from representing defendant because of his representation that the interests of his clients conflicted. Attorney Mark Jackson was then appointed to represent defendant but later sought and was granted leave to withdraw, and Kenneth Kinser was appointed and represented defendant throughout the trial. Diamond continued to represent defendant's sister, and defendant complains that his attorney merely duplicated much of what his sister's lawyer did. Defendant gives numerous examples of action or inaction by his counsel which he considers as demonstrating incompetence. Many of the matters complained of, including waiver of an opening statement after permission was denied to reserve it until close of the State's case (*People v. Georgev* (1967), 38 Ill. 2d 165, 169, *cert. denied* (1968), 390 U.S. 998, 20 L. Ed. 2d 97, 88 S. Ct. 1202) and brief cross-examination (*People v. Keagle* (1955), 7 Ill. 2d 408, 415, *cert. denied* (1956), 351 U.S. 942, 100 L. Ed. 1468, 76 S. Ct. 842), are matters of trial strategy as to which hindsight frequently indicates a different course might have been preferable (*People v. Keagle* (1955), 7 Ill. 2d 408, 416). Similarly, trial counsel may at times have considered silence preferable to the emphasis which objections, motions to strike, or instructions to disregard give to otherwise objectionable matters. (*People v. Greer* (1980), 79 Ill. 2d 103; *People v. Newell* (1971), 48 Ill. 2d 382; *People v. Martin* (1970), 44 Ill. 2d 489.) The record here shows several conferences during trial but outside the presence of the jury in which both counsel discussed with the judge and their clients the fact that the clients wanted alibi witnesses

called whom counsel believed would not be helpful and witnesses cross-examined whom counsel thought best excused without the reemphasis which cross-examination would give to unfavorable facts. At those conferences it is clear that the trial judge considered both lawyers to be competently representing their clients. Defendant complains that counsel presented no evidence other than that of the codefendant Bernice Lewis. It is clear, however, that counsel had read reports, including reports concerning statements of the possible alibi witnesses. It does not seem to us that duplication of a codefendant's motions, or adoption of a codefendant's arguments, can be said to have prejudiced defendant, when no objection is made to their substance.

Of the numerous instances alleged to demonstrate incompetence, several merit separate treatment. Defendant had several prior convictions, including 1965 and 1966 felonious assaults in New York with a knife and a firearm, a 1966 California conviction for second-degree robbery, and a 1969 Minnesota conviction for bank robbery. There is no showing in the record of the periods of imprisonment or the dates of discharge. Under *People v. Montgomery* (1971), 47 Ill. 2d 510, those convictions were admissible for impeachment purposes if defendant had been discharged from confinement within 10 years. Since defendant had been sentenced to 20 years' imprisonment on the bank robbery, it quite likely would have been held admissible. It is here urged that trial counsel was incompetent for failure to make an *in limine* motion to preclude use of the convictions if defendant testified. We do not agree, for it is by no means clear that the admissibility of his record was the sole motivating factor preventing defendant from testifying during the guilt-determining

phase of the trial. The fact that he did not testify in the sentencing phase, even though the full record had been admitted in those proceedings, would seem to be some indication that there were reasons other than his criminal record for his failure to testify. This fact, coupled with the probability that the motion to exclude would have been denied (*People v. Spates* (1979), 77 Ill. 2d 193; *United States v. Callison* (8th Cir. 1978), 577 F. 2d 53, *cert. denied* (1978), 439 U. S. 873, 58 L. Ed. 2d 187, 99 S. Ct. 209; *Bendelow v. United States* (5th Cir. 1969), 418 F. 2d 42, *cert. denied* (1970), 400 U. S. 967, 27 L. Ed. 2d 387, 91 S. Ct. 379), militate against a characterization of that conduct as demonstrating incompetence. Counsel is not required to make losing objections in order to provide effective representation. *People v. Johnson* (1970), 45 Ill. 2d 501.

If made, an objection to the judge-conducted *voir dire* would have failed (*People v. Jackson* (1977), 69 Ill. 2d 252), and the fact that counsel did not ask for notation of the race of jurors was not incompetence. Defendant's objection to the *voir dire* examination and jury composition appears to have been an unsupportable demand for a proportionate number of his race on the jury and venire in this case. (*Swain v. Alabama* (1965), 380 U. S. 202, 13 L. Ed. 2d 759, 85 S. Ct. 824; *People v. Powell* (1973), 53 Ill. 2d 465, 477-78.) It was entirely proper for the judge to omit mention of Bernice Lewis in asking whether jurors could obey their oaths despite the possibility of a death penalty, since there was no possibility of that penalty applying to her.

A number of the leading questions posed to Farris were apparently designed not so much to lead him as to

limit his testimony so as to avoid any hearsay testimony concerning statements by Sangster. Attorney Kinser had objected to such hearsay, and may have tolerated these leading questions rather than take the risk that hearsay would be elicited, since he would then be forced to rely on the jurors' ability to disregard it.

An additional claim of error involves an episode late in the trial when a prosecution witness made reference to a meeting when defendant was "visiting his probation officer." A motion for mistrial was made by Attorney Kinser. The judge indicated he was willing to grant the motion, but that it would likely result in defendant being later tried with Willie Sangster, whose trial originally had been consolidated with that of the Lewises, but then continued to the following month. The judge also indicated that if the defendant desired to withdraw the motion for mistrial, he would admonish or instruct the jury to disregard the improper reference.

It is an overstatement to assert, as defense counsel now does, that the judge placed a "condition" on the grant of mistrial. The judge, in discussions with defendant, made it clear that motions for severance would be considered later if it appeared that a joint trial would prejudice defendant.

Perhaps some attorneys might have pressed the judge to consider severance at the same time as he considered mistrial and might have attempted to obtain a ruling on that issue prior to deciding whether or not to withdraw the motion for mistrial. However, even the defendant's brief acknowledges that a sufficient showing of antagonistic defenses had not been made when the pretrial objec-

tions to Sangster's consolidation had been made. Production of additional evidence would have necessitated delay in the trial, and, if severance were denied, a delay would have resulted in the admonition given the jury to disregard the improper reference. Given the circumstances here, we believe counsel cannot be accused of incompetence for failing to insist that the court rule in a form the judge was not obliged to follow. Nor will we speculate that the court would have erred on a later motion for severance. The effect, if any, of the reference to the probation officer was necessarily limited to the guilt phase of the trial, for defendant's entire criminal record was before the jury during the sentencing phase. As we earlier indicated, the testimony and evidence of defendant's guilt, if believed, was overwhelming, and we do not believe there is any reasonable possibility that the "slip" complained of might have contributed to the conviction. *Chapman v. California* (1967), 386 U. S. 18, 17 L. Ed. 2d 705, 87 S. Ct. 824.

Both in the guilt phase and prior to finding an aggravating factor in the sentencing phase, the jury was given modified versions of Illinois Pattern Jury Instructions (IPI), Criminal, Nos. 1.01, 1.03 (1968), which indicated, among other things, that arguments were to be confined to evidence, and were to be disregarded if not confined to evidence and reasonable inferences therefrom. In view of those instructions we consider defendant's complaint of inaccuracies in the prosecutor's argument to be inconsequential. Similarly, the remarks in attorney Diamond's closing argument implying defendant's guilt (*People v. Nilsson* (1970), 44 Ill. 2d 244, *cert. denied* (1970), 398 U. S. 954, 26 L. Ed. 2d 296, 90 S. Ct. 1881; *People v. Clark*

(1972), 52 Ill. 2d 374) were not "material factors" in the jury's verdict. Counsel appears to have made a tactical judgment as to these arguments, as with the probation-officer "slip" where the judge agreed that some attorneys would thing it best to say nothing at all, thus lessening the impact on the jury by not emphasizing the matter. *People c. Carlson* (1980), 79 Ill. 2d 564, 584-85; *People v. Greer* (1980), 79 Ill. 2d 103, 120-24; *People v. Hills* (1980), 78 Ill. 2d 500, 505-07; *People v. Morris* (1954), 3 Ill. 2d 437, 449.

Defendant's appellate counsel also claims that the lack of communication between defendant and his trial counsel establishes ineffective assistance of counsel. We do not agree. Although on the day of the post-trial motion defendant stated that there never was any "rapport" between him and his counsel and although he had, prior to trial, written the judge a letter requesting different counsel, he appears to have generally communicated with defense counsel adequately during trial. Thus, on May 18, the fourth day of the trial, he stated:

> "DEFENDANT CORNELIUS LEWIS: • • •. Mr. Kinser and I have had misunderstandings since we come on the case. But, since the beginning of this trial I don't—I don't think we have had that much—much dissatisfaction with each other.
>
> The first day maybe so, you know. There were a few things that I thought should have been relevant, you know, to the case, you know.
>
> But, this morning, you know, after—after he explained to me the logic behind not asking certain questions, you know, or contesting certain answers, I consented. Didn't I agree that is the route that we should agree with?
>
> MR. KINSER: Yes."

Although he indicated he was not satisfied with the judge's response to his letter, he stated:

> "DEFENDANT CORNELIUS LEWIS: Once I recognized the fact that Mr. Kinser and I were, you know, through this to the end, you know, I just put my mind on trying to work with him."

His differences with his attorney were hardly "irreconcilable," as in *Brown v. Craven* (9th Cir. 1970), 424 F. 2d 1166, where the defendant would not speak to his lawyer. On May 22, the next-to-last day of the trial, defendant indicated agreement with counsel concerning whether defendant should testify and indicated they were working together with respect to the possible alibi witnesses. In retrospect, with a verdict of guilty and the death penalty, it can be argued that many things should have been done differently. Viewed in the context of an ongoing trial, however, the record does not establish incompetence.

Defendant contends that the fact that a motion for substitution of judges was filed March 15, 1979, invalidates (Ill. Rev. Stat. 1977, ch. 38, par. 114—5) Judge Scott's actions that same day (1) allowing Mr. Diamond to withdraw as defendant's counsel, (2) allowing, on March 19, Mr. Jackson (who had been appointed on March 15) to withdraw and (3) appointing, on March 19, Mr. Kinser as defendant's counsel. There is no allegation that Judge Scott purposefully appointed counsel whom he believed was not qualified. Defendant contends, however, that he did not consent to appointment of someone other than the Macon County public defender. Ill. Rev. Stat. 1977, ch. 34, par. 5604.

The docket entry for March 15, 1979, indicates attorney Diamond was allowed to withdraw and attorney Jackson appointed prior to allowance of the motion for substitution of judges. It is undisputed that attorney Jackson's motion to withdraw had to be allowed since his firm represented the robbed bank and had, in fact, advised the bank concerning a reward. (*People v. Stoval* (1968), 40 Ill. 2d 109.) As in *People ex rel. Walker v. Pate* (1973), 53 Ill. 2d 485, 504-05, a prompt "administrative act" was required, to insure that time pressures did not interfere with the right of the defendant to a fair trial. The action by Judge Scott was in the nature of "a formal or ministerial" one which in the absence of an allegation of purposeful appointment of unqualified counsel had little or no direct relation to the merits of the case. See *Gieffels v. State* (Alaska 1976), 552 P. 2d 661.

A defendant in a criminal case does not, of course, have the right to choose appointed counsel. (*People v. Cox* (1961), 22 Ill. 2d 534, *cert. denied* (1963), 374 U. S. 855, 10 L. Ed. 2d 1076, 83 S. Ct. 1925.) On March 13, after Judge Scott informed defendant that he would appoint the Macon County public defender, the judge asked whether defendant had any questions, to which he replied:

> "Yes sir, the first, of course, will be I will not speak with anyone this court recommends from this county as representative of me."

Having, in effect, rejected both the public defender and private Macon County attorneys, defendant cannot now complain of failure to consent to not being represented by the public defender. See *People v. Lairson* (1971), 131 Ill. App. 2d 612; *People v. Hubbard* (1966), 77 Ill. App. 2d 14.

Defendant contends that the judge should have immediately conducted an evidentiary hearing upon receipt of his letter of April 8, 1978. The judge instead answered the defendant by letter and denied his request. The defendant's letter complained of attorney Kinser's appointment because the latter allegedly "personally knew and associated with the decedent on a social and professional level." Defendant also stated his attorney was not acting in defendant's interest, and requested appointment of a named Champaign County attorney. There was no allegation that attorney Kinser had ever represented decedent, so as to raise the problem addressed in *People v. Stoval* (1968), 40 Ill. 2d 109.

Even though the judge did not conduct an evidentiary hearing prior to answering the letter, there were later occasions when attorney Kinser was discussed by defendant and the trial judge. Nothing appears in the record of those occasions to indicate that there was any substantial factual basis underlying the allegations. Attorney Kinser was under an obligation to inform the court of any substantial potential conflict (*Hollaway v. Arkansas* (1978), 435 U. S. 475, 55 L. Ed. 2d 426, 98 S. Ct. 1173), and neither he nor appellate counsel has called our attention to any facts supporting the allegations.

Considering the case in the context of the entire record, we conclude that the trial judge was not obliged to hold an evidentiary hearing upon receipt of defendant's letter. See *United States v. Morrissey* (2d Cir. 1972), 461 F. 2d 666.

Defendant contends that the court erred in giving certain instructions relating to justification for the use of force and an instruction relating to a permissive inference

from possession of recently stolen property. We think it clear that the jurors, who were informed that it was their duty to consider all of the instructions, could not have been misled. The instructions as to force were: "A person is not justified in the use of force if he is committing a forcible felony." "When I use the word 'forcible felony' I mean Armed Robbery." The jury was instructed not to single out individual instructions. The following were also given:

> "To sustain the charge of Armed Robbery, the State must prove the following propositions:
>
> First: That the defendant took U. S. Currency from the persons of Donald Bivens, Sr., Teresa Carnahan, Kay Pinkley, Kathy Johnson, Carol Woodcock and Ida King; and
>
> Second: That the defendant did so by the use of force or by threatening the imminent use of force; and
>
> Third: That the defendant was armed with a dangerous weapon.
>
> If you believe from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.
>
> If, on the other hand, you find from your consideration of all the evidence that any of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.
>
> Each defendant is presumed to be innocent of the charges against each. This presumption remains with each defendant throughout every stage of the trial and during your deliberations on the verdict, and is not overcome unless from all the evidence in the case you are convinced beyond a reasonable doubt that a defendant is guilty.

> The State has the burden of proving the guilt of a defendant beyond a reasonable doubt, and this burden remains on the State throughout the case. The defendants are not required to prove their innocence."

The complained-of instructions would not ordinarily be understood by jurors to indicate that defendant was guilty of armed robbery. Rather, they merely eliminate, if the jury did find armed robbery, possible confusion as to the gun-drawing testimony's effect on the murder charge.

The court also gave the following instruction:

> "If you find that a defendant had exclusive possession of recently stolen property, and there was not reasonable explanation of that possession, you may infer that a defendant obtained possession of the property by Armed Robbery."

Defendant claims the evidence did not support giving this instruction and that, in any event, it violates the defendant's rights under the fifth and fourteenth amendments to the United States Constitution.

We earlier noted Mrs. Morgan's and Dwight David's testimony relating to two occasions when the defendant had exclusive possession of large quantities of money. Mrs. Morgan testified that she saw defendant and his sister seated in Mrs. Morgan's living room, counting money on the coffee table, with "blank money orders from the bank and money wrappers" as well as black briefcases nearby. It was reasonable for the jury to conclude that this was Citizens National Bank money, with Citizens National Bank money orders and wrappers. The jury could reasonably conclude that this money was stolen, as well as that which Dwight David testified he received from defendant and on which fingerprints of a Citizens Na-

tional Bank teller were found and the serial numbers of which matched those shipped to the bank.

The instruction was clearly permissive, rather than mandatory. When read together with the rest of the instructions it is clear that this instruction had the limited purpose of connecting the defendant with an armed robbery independently proved. No rational jury could interpret the words "may be inferred" to indicate that possession alone would prove armed robbery, or that it was an irrebutable direction or that it shifted the burden of persuasion. *Sandstrom v. Montana* (1979), 442 U.S. 510, 514-15, 61 L.Ed. 2d 39, 45, 99 S.Ct. 2450, 2454.

Even putting this inference aside, the other evidence in this case was sufficient to amount to proof beyond a reasonable doubt of the elements of armed robbery. Thus the inference is tested by the less stringent test of *County Court v. Allen* (1979), 442 U.S. 140, 60 L.Ed. 2d 777, 99 S.Ct. 2213. The inquiry is whether "there is a 'rational connection' between the basic facts that the prosecution proved and the ultimate fact presumed, and the latter is 'more likely than not to flow from' the former." (*County Court v. Allen* (1979), 442 U.S. 140, 165, 60 L.Ed. 2d 777, 797, 99 S.Ct. 2213, 2228. See *People v. Housby* (1981), 84 Ill. 2d 415.) We believe the test is satisfied in the present case. There was a "rational connection" between the fact of possession of property recently taken in an armed robbery and the inferred fact of participation in the armed robbery.

Given the evidence in this case, and the basic fact of either the incident testified to by Mrs. Morgan or the

incident testified to by Dwight David, the ultimate fact of defendant's participation in the armed robbery was "more likely than not." It cannot be claimed that defendant was merely serving as a "fence," since stolen currency is not ordinarily the subject matter of such sales.

This court has repeatedly acknowledged the emphasis by the Supreme Court upon the qualitative difference between imprisonment and death as penalties, and the necessity to avoid arbitrary or capricious death sentences by adequately defining capital offenses, by directing sentencing discretion, and by providing adequate judicial review. (*People v. Gleckler* (1980), 82 Ill. 2d 145, 161-62; *People v. Brownell* (1980), 79 Ill. 2d 508, 532-34.) Those cases, when considered together with *People v. Carlson* (1980), 79 Ill. 2d 564, *People v. Greer* (1980), 79 Ill. 2d 103, and *People ex rel. Carey v. Cousins* (1979), 77 Ill. 2d 531, effectively demonstrate that we are not insensitive to the responsibilities involved in our review of capital cases and have not hesitated to vacate death penalties where improperly imposed. Our responsibilities, however, neither require nor permit reversal where no reasonable doubt of guilt exists, no reversible error has occurred, and there is no indication that the jury imposed the penalty on other than a reasoned basis.

We accordingly affirm the judgment of the circuit court of Champaign County. The clerk of this court is directed to enter an order fixing Friday, May 14, 1982, as the date on which the original sentence of death entered in the circuit court shall be executed. A certified copy of this order shall be furnished by the clerk of this court to the warden of the Illinois State Penitentiary at Joliet.

Judgment affirmed.

CHIEF JUSTICE GOLDENHERSH, concurring:

I joined Mr. Justice Ryan in his dissent in *People ex rel. Carey v. Cousins* (1979), 77 Ill. 2d 531, and for the reasons therein stated am of the opinion that the death penalty provisions of section 9—1 of the Criminal Code are unconstitutional. Following the decision of *People ex rel. Carey v. Cousins* I have concurred in several opinions pertaining to the application of certain provisions of section 9—1. (*People v. Greer* (1980), 79 Ill. 2d 103; *People v. Brownell* (1980), 79 Ill. 2d 508; *People v. Carlson* (1980), 79 Ill. 2d 564; *People v. Walker* (1981), 84 Ill. 2d 512.) Because it was held that the death penalty could not be imposed in those cases, there was no reason to explain my concurrence in the court's opinion.

It is apparent that the General Assembly and a majority of the electorate of this State desire that the death penalty be available as a sanction in certain types of cases. If this court were the final tribunal to determine the validity of the statute in its present form I would continue to dissent in the hope that ultimately a majority of the court would agree or that the General Assembly might be persuaded to effect the amendments which I consider necessary to render the statute valid. In this situation, however, the Supreme Court can grant *certiorari* and decide the questions on which this court is divided.

Once this court has spoken, I, like any other citizen of Illinois, must acquiesce in its decision. That there be a final decision on the issue is of great importance for the reason that there are now pending before this court 26 cases wherein death penalties have been imposed. It is essential that the question of the validity of the statute be

determined. Consequently, with considerable reluctance, under the compulsion of *People ex rel. Carey v. Cousins*, I concur in the opinion affirming the judgment of the circuit court of Champaign County.

JUSTICE RYAN, also concurring:

I concur in the opinion and the judgment of the court in this case. I also join in the concurrences of Mr. Chief Justice Goldenhersh and Mr. Justice Clark, who have expressed precisely my reason for no longer adhering to the rationale of the dissent which I authored in *People ex rel. Carey v. Cousins* (1979), 77 Ill. 2d 531, 544, *cert. denied* (1980), 445 U.S. 953, 63 L. Ed. 2d 788, 100 S. Ct. 603. Having authored that dissent, which now forms the basis of Mr. Justice Simon's dissent in this case, I feel compelled to add my observations to those made by the chief justice and Mr. Justice Clark.

In considering the question with which the chief justice, Mr. Justice Clark and I are faced, one is compelled to accept the very fundamental concept that ours is a government of law and not of men. In fact, this court has incorporated that concept in the Standards of Judicial Conduct by providing in our Rule 61(c)(1):

> "A judge should bear in mind that ours is a government of law and not of men and that his duty is the application of general law to particular instances." 73 Ill. 2d R. 61(c)(1).

This court, not seven individual justices, has considered the constitutionality of our death penalty statute and this court found it to be constitutional. Those of us who disagree with that conclusion voiced our dissent. Having done so, it is now our obligation to accept the law as pro-

nounced by this court. This is not to say that the holdings of this court are cast in stone and forever unchangeable. However, nothing has changed since this court's decision in *Cousins* except one member of the court that decided *Cousins* has retired. As Mr. Justice Clark stated in his concurrence, the circumstances which warrant changes in the law do not include changes in personnel of the court. If the law were to change with each change in the makeup of the court, then the concept that ours is a government of law and not of men would be nothing more than a pious cliche.

For this reason, although I authored the dissent in *Cousins,* I concur in the opinion and judgment of the court in this case.

JUSTICE CLARK, also concurring:

I concur in the opinion and judgment of the court. Two years ago I joined in Mr. Justice Ryan's dissent in *People ex rel. Carey v. Cousins* (1979), 77 Ill. 2d 531, 544, *cert. denied* (1980), 445 U.S. 953, 63 L.Ed. 2d 788, 100 S.Ct. 603. Since then I have participated in and, indeed, have authored opinions in other cases where the death penalty statute was in issue. (See *People v. Walker* (1981), 84 Ill. 2d 512 (plurality opinion); *People v. Gleckler* (1980), 82 Ill. 2d 145 (majority opinion); *People v. Carlson* (1980), 79 Ill. 2d 564 (dissenting opinion); *People v. Brownell* (1980), 79 Ill. 2d 508 (majority opinion); *People v. Greer* (1980), 79 Ill. 2d 103 (dissenting in part).) Participation in these cases has given me an invaluable opportunity to consider and reflect upon both the Supreme Court's pronouncements concerning the death penalty and this court's opinion on the subject.

Subsequent to this court's decision and the Supreme Court's denial of *certiorari* in *People ex rel. Carey v. Cousins*, I acquiesced in the majority's view on the issue of the prosecutor's ability to request a death sentence hearing. Indeed, in *People v. Brownell*, where the precise issue decided in *People ex rel. Carey v. Cousins* was again presented, that being a procedural question, namely the method of the submission of the death penalty hearing to the court, and not the question of the constitutional validity of the death sentence *per se*, which issue has been decided by the United States Supreme Court, it was said, in an opinion filed without dissent:

> "As to the defendant's other arguments that the prosecutor's discretion to request a sentencing hearing will lead to cruel and unusual punishment and the arbitrary and capricious imposition of the death penalty in violation of the eighth amendment, we believe those issues were addressed and resolved in our recent decision in *People ex rel. Carey v. Cousins* (1979), 77 Ill. 2d 531. There we held that the discretion vested in the prosecutor pursuant to section 9—1(d) of the murder statute (Ill. Rev. Stat. 1977, ch. 38, par. 9—1(d)) does not offend the eighth amendment because the prosecutor does not act as the sentencing authority. He merely requests a sentencing hearing dependent upon whether the requisite elements for a death sentence exist. Also, we held that the prosecutor's discretion is sufficiently guided since he will request a sentencing hearing at the conclusion of the trial, after he will have had the opportunity to elevate evidence to determine whether a sentencing hearing is, indeed, warranted.
>
> The next contention of the defendant—that section 9—1(d) constitutes an improper delegation of legislative authority and an improper grant of judicial sentencing power to the executive branch—was also decided and rejected in *People ex rel. Carey v.*

Cousins (1979), 77 Ill. 2d 531. We need not consider it again here." (79 Ill. 2d 508, 527-28.)

It is my considered opinion that, having once expressed my disagreement with an opinion of the court and then having followed such opinion in a case which was decided shortly after, it would be inconsistent to reverse my position simply because a new justice has joined this court. I agree with the view expressed by my distinguished colleague in his dissent that the doctrine of *stare decisis* does not mean that the law is immutable and rigid. On the contrary, I am a firm believer in the continuing evolution of our law and of the requirement that it change to meet changing circumstances. I think, however, that the circumstances which warrant changes in the law do not include changes in personnel. Rather, the circumstances I consider significant enough to bring about changes in the law are those which render an existing rule of law impracticable or unjust and which will bring about a sensible and just result. When those circumstances are present, I will vigorously vote to change the law.

I think, however, that a serious mistake would be made if, at this juncture, this court overruled *People ex rel. Carey v. Cousins* and struck down the death penalty statute. An opportunity to strike down the act was passed up two years ago. In the interim, several other opinions have approved the procedure whereby the prosecutor requests a death sentence hearing. Were we to declare the act void now, those opinions would stand for naught. They were the result of a great deal of deliberation by this court and represent our best efforts to offer lucid instruction on this exceedingly difficult issue. It would be grossly unfair to the citizens of the State and members of the

General Assembly that, rather than declare the act unconstitutional when the first opportunity arose in *People ex rel. Carey v. Cousins*, we permitted prosecutors, the General Assembly, the judiciary, and criminal defendants, as well as the citizens of Illinois, to rely on our pronouncement that the act was constitutional. If we were to decide now, four years after passage of the act, and after so many persons sit on death row, that the act is unconstitutional, a great disservice to the stability of the law would be perpetrated by this court. Such a result would indicate that this court does not decide issues based on the law, but based instead on who happens to be sitting the court at a particular time.

Secondly, striking down the death penalty statute at this point on the ground that the statute violated the State constitutional separation of powers principle would prevent the United States Supreme Court from considering this case or any other capital case arising in Illinois. Thus, the General Assembly would be forced to continue to speculate as to whether any death penalty statute it might devise could pass the scrutiny of the United States Supreme Court.

Finally, I agree with Mr. Justice Traynor's statement that once a judge has dissented, he is obligated to follow the law as pronounced. The respected jurist and scholar wrote:

> "Paradoxically the well-reasoned dissent, aimed at winning the day in the future, enhances the present certainty of the majority opinon, now imbedded in the concrete of resistance to the published arguments that beat against it. For that very reason the thoughtful dissident does not find it easy to set forth his dissent.

> Once he has done so he has had his day. He should yield to the obligation that is upon him to live with the law as it has been stated. He may thereafter properly note that he is concurring under compulsion, abiding the time when he may win over the majority, but he should regard dearly enough the stability of the law that governs all the courts in the state not to renew the rataplan of his dissent. When the trial court properly follows the declared law and is duly affirmed by the intermediate court, he should not vote for a hearing on the basis of his dissent. Conversely, should the trial court be reversed on the basis of his dissent, he should vote for a hearing. When the court has granted a hearing in a case with multiple issues, including the ancient one, and there is a nucleus of dissenters on other issues, he should not cast his vote on the basis solely of his ancient dissent to achieve a reversal or affirmance that would not otherwise have materialized. To do so would only work mischief. The judge's responsibility to keep the law straight is not less when he is a dissenter." Traynor, *Some Open Questions on the Work of State Appellate Courts*, 24 U. Chi. L. Rev. 211, 218-19 (1957).

I would only add that once a judge has expressed a differing view from the majority, and has then acquiesced in the majority view, to the point of writing an opinion which accords the majority's view its rightful place as the controlling law on the matter, due regard for the consistency of this court's opinions leads a judge to continue to follow the majority's view.

JUSTICE MORAN, also concurring:

The dissent of my colleague, Mr. Justice Simon, has raised two issues which he believes render the Illinois

death penalty statute unconstitutional. The first issue concerns the failure of the statute to set forth "objective standards guiding the exercise of a prosecutor's discretion to seek the death penalty * * *." (88 Ill. 2d at 190.) The other issue relates to the inadequacy of notice to the defendant as to when the prosecutor will seek the death penalty. I disagree with the conclusions reached on both of these issues and feel compelled to respond in the event further review of this case occurs.

It is not every case of murder that a prosecutor may seek the death penalty. He may do so only when one or more of the seven aggravating factors listed under section 9—1(b) of the Criminal Code of 1961 (Ill. Rev. Stat. 1977, ch. 38, par. 9—1(b)) is present. It is my view that these seven aggravating factors constitute objective standards under which the prosecutor may *seek* the death penalty. It is totally inaccurate to refer to the prosecutor as the one who *imposes* the sentence. It is the sentencing body—judge or jury, as the case may be—that imposes the sentence. The prosecutor only triggers the procedure to be followed and then only when the evidence establishes that one or more of the aggravating factors is present.

The issue of prosecutorial discretion in capital cases has been addressed in the plurality and concurring opinions in *Gregg v. Georgia* (1976), 428 U.S. 153, 49 L.Ed. 2d 859, 96 S.Ct. 2909, *Proffitt v. Florida* (1976), 428 U.S. 242, 49 L.Ed 2d 913, 96 S.Ct. 2960, *Jurek v. Texas* (1976), 428 U.S. 262, 49 L.Ed. 2d 929, 96 S.Ct. 2950, and the dissent of Mr. Justice White in *Roberts v. Louisiana* (1976), 428 U.S. 325, 337, 49 L.Ed. 2d 974, 984, 96 S.Ct. 3001, 3008 (White, Jr., Burger, C.J., and Blackmun and Rehnquist, JJ., dissenting).

The plurality opinion of Mr. Justice Stewart in *Gregg,* joined by Mr. Justice Powell and Mr. Justice Stevens, stated:

> "First, the petitioner focuses on the opportunities for discretionary action that are inherent in the processing of any murder case under Georgia law. He notes that the state prosecutor has unfettered authority to select those persons whom he wishes to prosecute for a capital offense and to plea bargain with them. Further, at the trial the jury may choose to convict a defendant of a lesser included offense rather than find him guilty of a crime punishable by death, even if the evidence would support a capital verdict. And finally, a defendant who is convicted and sentenced to die may have his sentence commuted by the Governor of the State and the Georgia Board of Pardons and Paroles.
>
> The existence of these discretionary stages is not determinative of the issues before us. At each of these stages an actor in the criminal justice system makes a decision which may remove a defendant from consideration as a candidate for the death penalty. *Furman,* in contrast, dealt with the decision to impose the death sentence on a specific individual who had been convicted of a capital offense. Nothing in any of our cases suggests that the decision to afford an individual defendant mercy violates the Constitution. *Furman* held only that, in order to minimize the risk that the death penalty would be imposed on a capriciously selected group of offenders, *the decision to impose it had to be guided by standards so that the sentencing authority* would focus on the particularized circumstances of the crime and the defendant." (Emphasis added.) (428 U. S. 153, 199 & n.50, 49 L. Ed. 2d 859, 889 & n.50, 96 S. Ct. 2909, 2937 & n.50.)

In the same case, the concurring opinion of Mr. Justice White, joined by the Chief Justice and Mr. Justice Rehnquist, stated:

"Petitioner also argues that decisions made by the prosecutor—either in negotiating a plea to some offense lesser than capital murder or in simply decling to charge capital murder—are standardless and will inexorably result in the wanton and freakish imposition of the penalty condemned by the judgment in *Furman*. I address this point separately because the cases in which no capital offense is charged escape the view of the Georgia Supreme Court and are not considered by it in determining whether a particular sentence is excessive or disproportionate.

Petitioner's argument that prosecutors behave in a standardless fashion in deciding which cases to try as capital felonies is unsupported by any facts. Petitioner simply asserts that since prosecutors have the power not to charge capital felonies they will exercise that power in a standardless fashion. This is untenable. Absent facts to the contrary, it cannot be assumed that prosecutors will be motivated in their charging decision by factors other than the strength of their case and the likelihood that a jury would impose the death penalty if it convicts. Unless prosecutors are incompetent in their judgments, *the standards by which they decide whether to charge a capital felony will be the same as those by which the jury will decide the questions of guilt and sentence.* Thus defendants will escape the death penalty through prosecutorial charging decisions only because the offense is not sufficiently serious; or because the proof is insufficiently strong. This does not cause the system to be standardless any more than the jury's decision to impose life imprisonment on a defendant whose crime is deemed insufficiently serious or its decision to acquit someone who is probably guilty but whose guilt is not established beyond a reasonable doubt. [illegible] the prosecutor's charging decisions are unlikely to have removed from the sample of cases considered by the Georgia Supreme Court any which are truly 'similar.' If the cases really were 'similar' in relevant respects, it is unlikely that prosecutors

would fail to prosecute them as capital cases; and I am unwilling to assume the contrary." (Emphasis added.) 428 U. S. 153, 224-25, 49 L. Ed. 2d 859, 903, 96 S. Ct. 2909, 2949.

The same plurality in *Proffitt* stated:

"The petitioner first argues that arbitrariness is inherent in the Florida criminal justice system because it allows discretion to be exercised at each stage of a criminal proceeding—the prosecutor's decision whether to charge a capital offense in the first place, his decision whether to accept a plea to a lesser offense, the jury's consideration of lesser included offenses, and, after conviction and unsuccessful appeal, the Executive's decision whether to commute a death sentence. As we noted in *Gregg*, this argument is based on a fundamental misinterpretation of *Furman*, and we reject it for the reasons expressed in *Gregg*. See [428 U. S. 153, 199, 49 L. Ed. 2d 859, 889, 96 S. Ct. 2909, 2937.]" (428 U. S. 242, 254, 49 L. Ed. 2d 913, 924, 96 S. Ct. 2960, 2967.)

And the same concurring justices stated:

"Accordingly, the Florida statutory scheme for imposing the death penalty does not run afoul of this Court's holding in *Furman v. Georgia*.

For the reasons set forth in my opinion concurring in the judgment in *Gregg v. Georgia* [(1976), 428 U. S. 153, 224-25, 49 L. E. 2d 859, 902-03, 96 S. Ct. 2909, 2948-49], and my dissenting opinion in *Roberts v. Louisiana* [(1976), 428 U. S. 325, 348-50, 49 L. Ed. 2d 974, 990-91, 96 S. Ct. 3001, 3013-14], this conclusion is not undercut by the possibility that some murders may escape the death penalty solely through exercise of prosecutorial discretion or executive clemency." 428 U. S. 242, 261, 49 L. Ed. 2d 913, 928, 96 S. Ct. 2960, 2970.

Again in *Jurek*, the same plurality stated:

> "The petitioner first asserts that arbitrariness still pervades the entire criminal justice system of Texas—from the prosecutor's decision whether to charge a capital offense in the first place and then whether to engage in plea bargaining, through the jury's consideration of lessor included offenses, to the Governor's ultimate power to commute death sentences. This contention fundamentally misinterprets the *Furman* decision, and we reject it for the reasons set out in our opinion today in *Gregg v. Georgia* [(1976), 428 U. S. 153, 199, 49 L. Ed. 2d 859, 889, 96 S. Ct. 2909, 2937]." (428 U. S. 262, 274-75, 49 L. Ed. 2d 929, 940, 96 S. Ct. 2950, 2957.)

And the same concurring justices stated:

> "I also cannot agree with petitioner's other major contention that under the new Texas statute and the State's criminal justice system in general, the criminal jury and other law enforcement officers exercise such a range of discretion that the death penalty will be imposed so seldom, so arbitrarily, and so freakishly that the new statute suffers from the infirmities which *Branch v. Texas* found in its predecessor." 428 U. S. 262, 278, 49 L. Ed. 2d 929, 942, 96 S. Ct. 2950, 2959.

While the plurality opinion in *Roberts* did not address the issue of prosecutorial discretion, the dissent of Mr. Justice White, joined by the Chief Justice, Mr. Justice Blackmun and Mr. Justice Rehnquist, did and stated:

> "Nor am I convinced that the Louisiana death penalty for first-degree murder is substantially more vulnerable because the prosecutor is vested with discretion as to the selection and filing of charges, by the practice of plea bargaining or by the power of executive clemency. Petitioner argues that these characteristics of the criminal justice system in Louisiana, combined with the discretion arguably left to the jury as discussed above, insure that the death penalty

will be as seldom and arbitrarily applied as it was under the predecessor status [sic]. The Louisiana statutes, however, define the elements of first-degree murder, and I cannot accept the assertion that state prosecutors will systematically fail to file first-degree murder charges when the evidence warrants it or to seek convictions for first-degree murder on less than adequate evidence. Of course, someone *must* exercise discretion and judgment as to what charges are to be filed and against whom; but this essential process is nothing more than the rational enforcement of the State's criminal law and the sensible operation of the criminal justice system. The discretion with which Louisiana's prosecutors are invested and which appears to be no more than normal, furnishes no basis for inferring that capital crimes will be prosecuted so arbitrarily and infrequently that the present death penalty statute is invalid under *Furman v. Georgia*.

I have much the same reaction to plea bargaining and executive clemency. A prosecutor may seek or accept pleas to lesser offenses where he is not confident of his first-degree murder case, but this is merely the proper exercise of the prosecutor's discretion as I have already discussed. So too, as illustrated by this case and the North Carolina case, *Woodson v. North Carolina, ante* [(1976), 428 U.S. 280, 49 L. Ed. 2d 944, 96 S. Ct. 2978], some defendants who otherwise would have been tried for first-degree murder, convicted, and sentenced to death are permitted to plead to lesser offenses because they are willing to testify against their codefendants. This is a grisly trade, but it is not irrational; for it is aimed at insuring the successful conclusion of a first-degree murder case against one or more other defendants. Whatever else the practice may be, it is neither inexplicable, freakish, nor violative of the Eighth Amendment. Nor has it been condemned by this Court under other provisions of the Constitution. *Santobello v. New York* [(1971), 404 U.S. 257, 30 L. Ed. 2d 427, 92 S. Ct. 495]; *North Carolina v. Alford* [(1970), 400

U. S. 25, 27 L. Ed. 2d 162, 91 S. Ct. 160]; *Parker v. North Carolina* [(1970), 397 U. S. 790, 25 L. Ed. 2d 785, 90 S. Ct. 1458]; *Brady v. United States* [(1970), 397 U. S. 742, 25 L. Ed. 2d 747, 90 S. Ct. 1463.] See also *Chaffin v. Stynchcombe* [(1973), 412 U. S. 17, 30-31, 36 L. Ed. 2d 714, 725-26, 93 S. Ct. 1977, 1984.]" 428 U. S. 325, 348-49, 49 L. Ed. 2d 974, 990-91, 96 S. Ct. 3001, 3013.

While I have overindulged in quoting excerpts from the above opinions, my point is that seven of the justices have addressed a similar issue to that raised in the dissent. Each of the seven justices found the issue to be without merit.

The remaining issues relates to the adequacy of notice to the defendant that the prosecutor intends to seek the death penalty. Mr. Justice Simon concludes "[t]hat 'notice' comes only on the morning the jury is selected." (88 Ill. 2d at 192.) I disagree. Notice to the defendant originates when the indictment is presented to him at the time of his arraignment. (See sections 113—1 and 113—4 of the Code of Criminal Procedure of 1963 (Ill. Rev. Stat. 1977, ch. 38, pars. 113—1, 113—4).) For the prosecutor to seek the death penalty, the indictment, or one of the counts thereof, must charge one or more of the seven aggravating factors listed in section 9—1(b). This places the defendant on notice that the prosecutor intends to seek the death penalty. After an appraisal of the evidence introduced at trial, the fact that the prosecutor decides not to seek such penalty does not invalidate the statute. To quote from *Gregg*, "Nothing in any of our cases suggests that the decision to afford an individual defendant mercy violates the Constitution." 428 U. S. 153, 199, 49 L. Ed. 2d 859, 889, 96 S. Ct. 2909, 2937.

I concur in the judgment of affirmance.

JUSTICE SIMON, dissenting:

The precise issue raised here—whether the Illinois death penalty statute (Ill. Rev. Stat. 1977, ch. 38, par. 9—1 *et seq.*) violates the separation of powers provisions of the Illinois Constitution of 1970 (Ill. Const. 1970, art. II, sec. 1)—was presented to this court in *People ex rel. Carey v. Cousins* (1979), 77 Ill. 2d 531. A majority of the justices who served on the court at that time concluded that the statute was not unconstitutional. But three of the judges who continue to sit on this court expressed the opposite view. Their reasoning and the added observations set forth below lead me to the same conclusion. The fact that these three judges do not now join in the views I express here should not, in my judgment, deter me from stating my opinion in this case either because I was not a member of this court when oral argument took place in this case or because of the principle of *stare decisis*.

To avoid a deadlocked court and at the urging of my fellow justices, I have already participated in one capital case argued before I took my place on the court. (*People v. Walker* (1981), 84 Ill. 2d 512.) If I refrain from participating in this case, the infirmities I find in the statute would not disappear. The same problem would be presented again in the next case in which the death penalty was adjudged. In the meantime the fate of Cornelius Lewis might be affected. The Governor's decision if Lewis seeks clemency or the consideration which might be given this case by Federal courts could be colored by what appears to be the Illinois Supreme Court's sanguine accept-

ance of the constitutionality of the death penalty statute. In fact, a deep rift exists among the justices. The false appearance would, of course, eventually be exposed, for in the next capital case raising the issue it would be my obligation to participate. I would then file the same opinion I do here, but no one can predict what might happen to Cornelius Lewis in the meantime.

It would be blatant folly for this court to acquiesce in the execution of Cornelius Lewis without disclosing that four of the judges comprising the present court, either now or in the past two years, have viewed the death penalty statute as unconstitutional. How much confidence can any member of the judiciary, any State official or any member of the General Assembly have that this statute will continue to be viewed as constitutional?

I agree that the law should be stable; ideally it should not shift with each change of personnel on a reviewing court. This is particularly true of principles of common law, constitutional interpretation or statutory application, especially when those principles have been adhered to for a long time. The concept of *stare decisis* is an accepted and appropriate legal tool. It is especially useful in many aspects of civil law. Lawyers relying on *stare decisis* are able to inform their clients with some degree of confidence how factual situations are likely to be decided on the basis of existing precedent. Where issues are close there is value in sacrificing individual views to the interests of uniformity, consistency and predictability.

But capital punishment is an area unsuited to that kind of analysis. (See, generally Douglas, *Stare Decisis*, 49 Colum. L. Rev. 735, 736-37 (1949).) In considering the death penalty's constitutionality we are not dealing with

an area in which the practicing bar requires predictability. What lawyer advises his client to commit murder on the ground that the death penalty is unconstitutional? Conversely, what lawyer advises his clients not to commit murder solely on the ground that it is not?

In addition, a firm foundation for the constitutionality of the death penalty has not yet been established. The past decade has seen but one involuntary execution in the entire country (and none in Illinois) as the courts have wrestled with the validity of various types of death penalty statutes. Two Illinois statutes have been struck down, one on Federal grounds (*Moore v. Illinois* (1972), 408 U.S. 786, 800, 33 L.Ed. 2d 706, 716, 92 S.Ct. 2562, 2570), another on State grounds (*People ex rel. Rice v. Cunningham* (1975), 61 Ill. 2d 353). The present statute has been the subject of litigation in this court for only two years, and a glance at our docket reveals a wealth of issues yet to be decided. The time has not yet come when the issue can be considered completely settled.

Most importantly, because of the nature of the death penalty I do not believe that any judge should be expected to stifle his own viewpoint in the interest of uniformity. To follow the dictate of *stare decisis* in a case like this is to allow the conclusions of the past to be stamped indelibly upon the law without opportunity for correction. As the late Mr. Justice Douglas put it, "It is, I think, a healthy practice (too infrequently followed), for a court to reexamine its own doctrine." (Douglas, *Stare Decisis*, 49 Colum. L. Rev. 735, 746 (1949).) "[T]he mere fact that an error has been committed is no reason or even apology for repeating it, much less perpetuating it." (*Hart v. Burnett* (1860), 15 Cal. 530, 600.) We have recently said:

"The tenets of *stare decisis* cannot be so rigid as to incapacitate a court in its duty to develop the law. • • • Clearly, the need for stability in law must not be allowed • • • to veil the injustice resulting from a doctrine in need of reevaluation." (*Alvis v. Ribar* (1981), 85 Ill. 2d 1, 24.)

Recently and prior to *Alvis,* in *People v. Banks* (1979), 75 Ill. 2d 383, 392, this court expressly overruled *People v. White* (1977), 67 Ill. 2d 107, which it had decided two years earlier. In fact, this court has often overruled precedent. See *Illinois Central Gulf R.R. Co. v. Sankey Brothers, Inc.* (1979), 78 Ill. 2d 56, overruling *Illinois Central R.R. Co. v. Seitz* (1905), 214 Ill. 350; *People v. Harris* (1978), 72 Ill. 2d 16, overruling *People v. Muir* (1977), 67 Ill. 2d 86; *Hanley v. Kusper* (1975), 61 Ill. 2d 452, 463, overruling in part *Lake Shore Auto Parts Co. v. Korzen* (1973), 54 Ill. 2d 237; *People v. Gregory* (1974), 59 Ill. 2d 111, overruling *People ex rel. Ledford v. Brantley* (1970), 46 Ill. 2d 419; *People v. McNeil* (1972), 53 Ill. 2d 187, overruling *People v. De Filippis* (1966), 34 Ill. 2d 129; *Pulliam v. Industrial Com.* (1969), 43 Ill. 2d 364, overruling *Hochspeier, Inc. v. Industrial Board* (1917), 278 Ill. 523; *Thorpe v. Mahin* (1969), 43 Ill. 2d 36, overruling a line of cases, including *Friedrich v. Wright* (1944), 386 Ill. 229; *Lorton v. Brown County Community Unit School District No. 1* (1966), 35 Ill. 2d 362, overruling *Erford v. City of Peoria* (1907), 229 Ill. 546; *McDaniel v. Bullard* (1966), 34 Ill. 2d 487, overruling *Wilcox v. Bierd* (1928), 330 Ill. 571; *Republic Steel Corp. v. Industrial Comm.* (1964), 30 Ill. 2d 311, overruling *Village of Glencoe v. Industrial Com.* (1933), 354 Ill. 190.

When the passage of time brings new judges to the bench, the doctrine of *stare decisis* does not obstruct a change from precedent, even though the identical question has recently been decided. Recent Illinois examples are: The seating of three new judges between 1970 and 1973 resulted in the decision in *People v. Nunn* (1973), 55 Ill. 2d 344, a criminal case, which overruled *People v. Koshiol* (1970), 45 Ill. 2d 573, decided three years earlier without dissent. The swing vote in *Nunn* was provided by a justice who participated in *Koshiol* without noting any dissent. Similarly, the question of comparative negligence addressed in *Alvis* had been settled, with the opposite conclusion, in *Maki v. Frelk* (1968), 40 Ill. 2d 193. But five of the seven justices who participated in *Alvis* had not participated in *Maki*. They were able to bring their fresh perspective to bear on the case, while the two justices left from the *Maki* court remained consistent in their views of the law. As a result, the *Alvis* majority reached a conclusion different from the *Maki* majority. If the same thing happened here, a new majority, different from that in *Cousins*, would be formed. The stakes are too high in a capital case to affirm a sentence merely for the sake of decisional stability when a newly seated judge of the highest reviewing court disagrees with some of his colleagues.

Justice Roger Traynor of California spoke nearly 25 years ago of the duties of a reviewing court judge in words which should be considered here. He thought that, once a dissent is registered, the dissenter should join the rest of the court in subsequent cases presenting the same issue "abiding the time when he may win over the majority." (Traynor, *Some Open Questions on the Work of State Appellate Courts*, 24 U. Chi. L. Rev. 211, 219

(1957).) Should a new member of the court also stifle his views and silently join the rest of the court, never revealing his understanding of the question? Mr. Justice Traynor does not say, but I infer from his words that he would think not:

> "Something is lost to the judicial process if judges fail to exert full responsibility for their decisions. Such responsibility imposes its own discipline. As they analyze issues that have been disputed every inch of the way, they learn to guard against premature judgment. Entrusted with decisions, bound to hurt one litigant or the other, they come to understand the court's responsibility in terms not of power but of obligation. The danger is not that they will exceed their power, but that they will fall short of their obligation." 24 U. Chi. L. Rev. 211, 224 (1957).

Eight years after publishing that article, Justice Traynor noted an earlier admonition of Judge Jerome Frank:

> "'[I]n criminal actions, where life or liberty is at stake, courts should not adhere to precedents unjust to the accused. It is never too late to mend.'" (*People v. Aranda* (1965), 63 Cal. 2d 518, 530, 407 P. 2d 265, 272, 47 Cal. Rptr. 353, 360, quoting *United States v. Delli Paoli* (2d Cir. 1956), 229 F. 2d 319, 323 (Frank, J., dissenting).)

Judge Frank also had occasion to discuss the strictures of *stare decisis* in *United States ex rel. Fong Foo v. Shaughnessy* (2d Cir. 1955), 234 F. 2d 715, 718, where he said:

> "For stare decisis should not govern in a case like this where a man's life is involved. Noteworthy here in Rex v. Taylor (1950) 2 K. B. 368, 371, where the English Court of Criminal Appeals overruled its own recent decision in Rex v. Turner, (1939) 1 All E. R. 330. The Court, after noting that the Court of Ap-

> peals in civil suits feels bound by its own earlier decisions as precedents in 'order to preserve the rule of stare decisis,' went on to say, 'This court, however, has to deal with questions involving the liberty of the subject,' and therefore felt free to overrule an unfortunate decision which favored the prosecution. Surely that should be the attitude of our courts which are much less bound by their own precedents than English courts have been traditionally."

Over 100 years ago this court observed:

> "[C]ases will sometimes occur in the decision of the most enlightened judges where the settled rules and reasons of the law have been departed from, and, in such cases, it becomes the duty of the court, before the error has been sanctioned by repeated decisions, to embrace the first opportunity to pronounce the law as it is. A solitary decision of recent date has never been held to change the law in any case; and especially should it not have that effect; where to adhere to it would be fraught with far greater public injustice than could possibly arise from overruling it in the particular case." *Frank v. Darst* (1853), 14 Ill. 304, 310.

So we are faced with the strange spectacle of this court still adhering to the *Cousins* decision although a majority of its judges have stated that it does not represent the correct conclusion. Whether this court acknowledges it, the *Cousins* dissent set forth the proper statement of the law. I believe that, with this dissent, I am upholding the law and pointing out the error that was made in *Cousins*. If the three judges who dissented in *Cousins* were joining me now, a new majority would be formed and the Illinois death penalty statute would be held unconstitutional. This clearly visible paradox cannot be camouflaged by the often quoted but academic assertion that this is a government of law and not of men.

Upholding the death penalty statute, with the standardless and unguided discretion granted to the 102 prosecutors who each hold the death penalty in their hands, is what makes for a government of men instead of law.

The Illinois death penalty statute (Ill. Rev. Stat. 1979, ch. 38, par. 9—1 *et seq.*) violates the system of separated powers set up by the Illinois Constitution of 1970. The constitution provides that no branch of government may exercise powers entrusted to another (Ill. Const. 1970, art. II, sec. 1), but the death penalty statute injects the prosecutor into the exclusively judicial province of sentencing.

The statute provides that in a murder prosecution the court, "where requested by the State," shall conduct a sentencing hearing to determine if the death penalty should be imposed. (Ill. Rev. Stat. 1979, ch. 38, par. 9—1(d).) The prosecutor has the sole, unlimited discretion to call for a death penalty hearing; that decision is the *sine qua non* of the death penalty. The statute places the first round of decision in the hands of the prosecutor. Is that constitutional?

For a discussion of the basis for the holding that it is not, the dissent in *People ex rel. Carey v. Cousins* (1979), 77 Ill. 2d 531, 544-61, cannot be surpassed. I wholeheartedly endorse its reasoning and adopt it as part of this dissent. It is incorporated as an appendix hereto. See also Note, *The Prosecutor's Discretionary Power to Initiate the Death Sentencing Hearing—People ex rel. Carey v. Cousins*, 29 DePaul L. Rev. 1097 (1980).) The imposition of a criminal sentence is a judicial function, to be exercised within the range of penalties authorized by the legislature. To allow a prosecutor a veto in each

case in which the legislature has said that death may be imposed as a penalty is to curtail the power and function of the judicial branch. This violates the principle of separation of powers.

Let me add these thoughts. First, the constitutional convention considered the imposition of criminal sentences to be a purely judicial function. In debates over whether judges should be required to state upon the record the reasons for imposing the criminal sentence they chose, the delegates made it clear that they had in mind a pattern of criminal sentencing: The legislature picks a range of possible penalties, and the judge, after considering the particulars of the crime and the record of the defendant, chooses a sentence within that range. (See 3 Record of Proceedings, Sixth Illinois Constitutional Convention 1381 (hereinafter cited as Proceedings).) There was no room for the prosecutor in that pattern.

The pattern comports with the requirements of due process under the Federal Constitution. The eighth and fourteenth amendments do not allow the arbitrary or capricious imposition of the death penalty—like cases cannot be treated differently. (*Furman v. Georgia* (1972), 408 U. S. 238, 309-10, 33 L. Ed. 2d 346, 390, 92 S. Ct. 2726, 2762 (Stewart, J., concurring); *People v. Gleckler* (1980), 82 Ill. 2d 145, 171.) There must be clear factors guiding and justifying the decision to impose capital punishment, and these factors must be plainly stated in advance by statute. (*Gregg v. Georgia* (1976), 428 U. S. 153, 206, 49 L. Ed. 2d 859, 893, 96 S. Ct. 2909, 2940 (opinion of Stewart, J., joined by Powell and Stevens, JJ.); 428 U. S. 153, 222, 49 L. Ed. 2d 859, 901-02, 96 S. Ct. 2909, 2947-48 (White, J., concurring).) In keeping with this requirement, the Illi-

nois statute sets out a number of aggravating factors. (Ill. Rev. Stat. 1977, ch. 38, par. 9—1(b).) Yet, at the same time, death, like any other sentence, cannot be imposed rigidly in all cases—different cases cannot be treated alike. (*Roberts v. Louisiana* (1976), 428 U. S. 325, 333, 49 L. Ed. 2d 974, 981-82, 96 S. Ct. 3001, 3006 (opinion of Stewart, J., joined by Powell and Stevens, JJ.).) Thus, the sentencer must consider whatever mitigating factors the defendant might present to allay the imposition of the maximum penalty. (*Woodson v. North Carolina* (1976), 428 U. S. 280, 304, 49 L. Ed. 2d 944, 961, 96 S. Ct. 2978, 2991 (opinion of Stewart, J., joined by Powell and Stevens, JJ.); *Lockett v. Ohio* (1978), 438 U. S. 586, 604, 57 L. Ed. 2d 973, 989-90, 98 S. Ct. 2954, 2964-65 (opinion of Burger, C.J., joined by Stewart, Powell and Stevens, JJ.).) In keeping with this requirement, the Illinois statute sets out a number of mitigating factors to be considered. Ill. Rev. Stat. 1977, ch. 38, par. 9—1(c).

The procedures set forth for the death penalty are more explicit than those for other criminal sentences, and that is not surprising, given the nature of the punishment. Except for the veto given to the prosecutor, the procedures are similar to those in sentencing in the more ordinary criminal cases. The procedure is always the same in convictions for theft, burglary, battery, possession of drugs, robbery, conspiracy, solicitation, kidnapping, or attempted murder. The legislature sets forth a range of penalties, and, after hearing evidence in aggravation and mitigation, the judge chooses an appropriate sentence for the individual defendant.

The normal sentencing procedures are the same regardless of the rationale behind the sentence. Whether

the motivation is rehabilitation (as section 11 of the Illinois bill of rights (Ill. Const. 1970, art. I, sec. 11) provides) or something else, under the Code of Criminal Procedure of 1963 the sentence appropriate to the crime and the criminal is always determined in the same way. And nowhere in these procedures, aside from presenting the evidence in aggravation, is the prosecutor given authority over what sentence shall be imposed for a specific crime. Even in plea bargaining, where the defendant agrees to plead guilty upon the recommendation of a certain sentence from the prosecutor, the judge is not bound by the prosecutor's agreement. (73 Ill. 2d R. 402(d).) When it comes to sentencing, the discretion lies solely in the judiciary.

The infirmity of the death penalty statute is that it puts the prosecutor in a place where he has no business. The harshness of capital punishment is no excuse for relaxing the normal pattern of sentencing. Would there be any question that a statute would be unconstitutional if it allowed the prosecutor, on his own and with no standards to guide his judgment, to seek, say, Class X punishment for some burglaries instead of the usual Class 2 penalties?

This is not the first time the legislature has tried to create special procedures for capital punishment. A prior statute was struck down when it too abandoned the normal sentencing procedures and created a streamlined three-judge court to impose the death penalty. (*People ex rel. Rice v. Cunningham* (1975), 61 Ill. 2d 353.) If the legislature wishes to enact a death penalty for certain crimes, it must do so within the normal strictures of the State and Federal constitutions.

Second, the *Cousins* majority cited a string of cases (*People v. Bombacino* (1972), 51 Ill. 2d 17; *People v. Handley* (1972), 51 Ill. 2d 229; *People v. Sprinkle* (1974), 56 Ill. 2d 257) as examples of discretion granted to the prosecutor without violating the separation of powers doctrine. These cases held that the prosecutor was properly given the discretion to decide whether a juvenile could be prosecuted as an adult. (56 Ill. 2d 275, 261.) But what the majority did not mention was that this line of cases was abandoned in *People v. Rahn* (1974), 59 Ill. 2d 302. Rather than perpetuating the mistaken notion that the prosecutor could unilaterally make a judicial decision, the court in *Rahn* wisely reinterpreted section 2—7 of the Juvenile Court Act in effect at the time (Ill. Rev. Stat. 1971, ch. 37, par. 702—7) to hold that the final decision was the court's. Under *Rahn*, it was clear that the statute never gave the prosecutor the authority the majority in *Cousins* relied upon. *Rahn* held that the legislature's intention was that the ultimate determination be a judicial one. (59 Ill. 2d 302, 304-05.) Thus, the *Cousins* holding that the prosecutor may be given a veto over the sentencing decision stands bereft of any viable authority to support it.

Third, the State argues that the discretion afforded to the prosecutor is acceptable; that in reality it is no different than the discretion granted to the prosecutor when deciding initially whether to prosecute at all. The State claims that since nothing hinders a prosecutor from declining to prosecute, thus eliminating the possibility of the death penalty, nothing should hinder the much more limited decision to prosecute but without the possibility of the death sentence. The State asks: If a prosecutor can decide to prosecute without invading the judiciary's province, cannot a prosecutor decide whether to seek a death

penalty hearing without invading the judiciary's province?

The most persuasive answer to the question is set forth in the *Cousins* dissent—the Federal Constitution prohibits standardless exercises of discretion, and no standards are provided in the statute for the decision to seek the death penalty. Without standards, the prosecutor's decision to seek a death sentence hearing could be motivated by legally improper considerations. For example, in *People v. Walker* (1981), 84 Ill. 2d 512, a divided majority reversed a death penalty imposed after a defendant first withdrew his negotiated guilty plea (for which he had received 60 years' imprisonment), then entered an unnegotiated plea of guilty. Mr. Justice Ryan's concurring opinion expressed the view that the State's Attorney's vacillation over what was the appropriate penalty for the defendant's offenses violated the eighth and fourteenth amendments' requirement that any decision to impose the death penalty be, and appear to be, based on reason rather than caprice, emotion or mistake. See also *Gardner v. Florida* (1977), 430 U. S. 349, 51 L. Ed. 2d 393, 97 S. Ct. 1197.

The plurality opinion in *Walker,* written by Mr. Justice Clark, argued that due process requires that, in death cases where the prosecutor's change of mind results in a different sentence without any material change of facts, the State must show objective facts to justify the change of mind and thus dispel the appearance of vindictiveness. What is so obvious that it hardly needs pointing out is that neither problem would ever arise if there were objective standards guiding the exercise of a prosecutor's discretion to seek the death penalty, standards to which

the State's Attorney's decision to seek death could be compared to see if the decision was a product of caprice, emotion, mistake or vindictiveness. Even if the present arrangement comported with the Illinois constitutional doctrine of separation of powers, the lack of standards to guide the prosecutor's discretion would be fatal to the statute.

A further answer to the State's argument that the discretion afforded the prosecutor here is no different than the unlimited discretion given the prosecutor to initiate prosecutions is that the argument is based upon a faulty premise. The discretion given the prosecutor to commence a prosecution is *not* unbridled but is sharply limited by the State Constitution. The grand jury and the preliminary judicial hearing to determine probable cause are established by section 7 of the Illinois bill of rights (Ill. Const. 1970, art. I, sec. 7). They are provided by section 7 for the purpose of guiding and channeling the prosecutor's decision to prosecute.

The debates of the constitutional convention made it quite clear that the requirements of section 7 were regarded as checks on the decision to prosecute. As Delegate Weisberg said of the preliminary hearing:

> [T]he two basic characteristics are that the decision of whether or not to commence a prosecution is made by the prosecutor. It is his responsibility, and there is, I believe invariably coupled with that, a requirement that a court make a preliminary determination that there is some fair basis for that decision to make the defendant stand trial. (3 Proceedings 1437.)

While the check exercised by the judge finding probable cause to proceed in a preliminary hearing was clear, some delegates doubted whether the grand jury could effectively review the decision to prosecute. A common figure

bandied about in discussion was that 95% of the cases presented to a grand jury by the State's Attorney resulted in prosecution. Some thought the grand jury was a rubber stamp. To this Delegate Borek replied, on the basis of personal experience upon a grand jury, "We deliberated on there as strongly as we did here and really attempted to find whether this person had reason to be indicted or not." In the case of that grand jury, 41 of the 385 prosecutions that were sought by the State's Attorney were denied. (3 Proceedings 1440.) Delegate Hutmacher pointed out that even if the 95% figure were correct that still meant that in 5% of the cases the grand jury was protecting persons from groundless prosecution. 3 Proceedings 1448.

Delegate Arthur Lennon summarized the rationale behind sections 7 and 8 of the Illinois bill of rights:

> "Before a man stands trial out in the open, before a jury, should there be anything given to him which would give him a little protection to make sure that he isn't indiscriminately tried? And I think it's fair to say that all members of the committee felt that that is a valuable safeguard * * * ." 3 Proceedings 1441.

Thus, in the area of commencing prosecutions, the prosecutor does not act with unbridled discretion. No prosecution can go ahead on the whim of the prosecutor. Similarly, no death penalty hearing should depend solely on the whim of the prosecutor, as the statute now provides.

The unbridled discretion given to the State's Attorney by the current statute encourages unequal application of the death penalty. The 102 counties in Illinois potentially present 102 different death penalty policies. Executions cannot depend on geography. There can be but

one death penalty policy in this State, the one properly adopted by the legislature. Only one branch may properly impose it—the judiciary.

Finally, I am concerned by the inadequacy of notice to the defendant the death statute provides. I agree, as pointed out by the dissenting justices in *Cousins*, that the greater number of peremptory challenges allowed a defendant in a capital case is an uncertain and unsatisfactory indicator of whether the death penalty will be sought. But beyond that deficiency, even the "notice" the defendant receives when the prosecutor announces that the peremptory challenges for a capital case should be allowed is not enough. That "notice" comes only on the morning the jury is selected. Although the indictment may hint that the defendant is eligible for the death penalty, he is not actually faced with that prospect until the prosecutor actively seeks that penalty. Significant decisions must be made before that time. How can a defendant decide between a guilty plea or a trial; or, if a trial, between a bench trial and a jury trial, without knowing the stakes of a conviction? The current death penalty statute denies defendants the information needed to make the intelligent choices necessary for an effective defense.

I dissent from the sentence commanding the death of Cornelius Lewis. I would reverse that sentence and remand the cause to the circuit court for resentencing.

APPENDIX
TO
DISSENTING OPINION
OF
MR. JUSTICE SIMON

OMITTED

EXHIBIT B

SEAL

State of Illinois

Office of

CLERK OF THE SUPREME COURT

Springfield

62706

CLELL L. WOODS
Clerk

Telephone
Area Code 217
782-2035

February 2, 1982

Mr. John Steven Beckett
Attorney at Law
501 West Church Street
Champaign, IL 61820

In re: People State of Illinois, appellee, vs. Cornelius Lewis, appellant. No. 52338

Dear Mr. Beckett:

The Supreme Court today made the following announcement concerning the above entitled cause:

> On the court's own motion, the mandate is stayed pending the timely filing and disposition of a petition for writ of certiorari in the Supreme Court of the United States.

Very truly yours,

/s/ Robert H. Gillespy
Clerk of the Supreme Court

RHG:jae
cc:Cornelius Lewis
Tyrone Fahner-188 W. Rand.
Reno, O'Byrne & Kepley

EXHIBIT C

SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

EIGHTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

ILLINOIS DEATH PENALTY STATUTE
Ill. Rev. Stat., Ch. 38

§ 9-1. *Murder — Death Penalties — Exceptions — Separate Hearings — Proof — Findings — Appellate Procedures — Reversals*

(a) A person who kills an individual without lawful justification commits murder if, in performing the acts which cause the death:

(1) He either intends to kill or do great bodily harm to that individual or another, or knows that such acts will cause death to that individual or another; or

(2) He knows that such acts create a strong probability of death or great bodily harm to that individual or another; or

(3) He is attempting or committing a forcible felony other than voluntary manslaughter.

(b) *Aggravating Factors.* A defendant who at the time of the commission of the offense has attained the age of 18 or more and who has been found guilty of murder may be sentenced to death if:

1. the murdered individual was a peace officer or fireman killed in the course of performing his official duties and the defendant knew or should have known that the murdered individual was a peace officer or fireman; or

2. the murdered individual was an employee of an institution or facility of the Department of Corrections, or any similar local correctional agency, killed in the course of performing his official duties, or the murdered individual was an inmate at such institution or facility

and was killed on the grounds thereof, or the murdered individual was otherwise present in such institution or facility with the knowledge and approval of the chief administrative officer thereof; or

3. the defendant has been convicted of murdering two or more individuals under subsection (a) of this Section or under any law of the United States or of any state which is substantially similar to Subsection (a) of this Section regardless of whether the deaths occurred as the result of the same act or of several related or unrelated acts so long as the deaths were the result of either an intent to kill more than one person or of separate premeditated acts; or

4. the murdered individual was killed as a result of the hijacking of an airplane, train, ship, bus or other public conveyance; or

5. the defendant committed the murder pursuant to a contract, agreement or understanding by which he was to receive money or anything of value in return for committing the murder or procured another to commit the murder for money or anything of value; or

6. the murdered individual was killed in the course of another felony if:

(a) the murdered individual was actually killed by the defendant and not by another party to the crime or simply as a consequence of the crime; and

(b) the defendant killed the murdered individual intentionally or with the knowledge that the acts which caused the death created a strong probability of death or great bodily harm to the murdered individual or another; and

(c) the other felony was one of the following: armed robbery, robbery, rape, deviate sexual assault, aggravated kidnapping, forcible detention, arson, burglary, or the taking of indecent liberties with a child; or

7. the murdered individual was a witness in prosecution against the defendant, gave material assistance to the state in any investigation or prosecution of the defendant, or was an eye witness or possessed other material evidence against the defendant.

(c) *Consideration of factors in Aggravation and Mitigation.* The court shall consider, or shall instruct the jury to consider any aggravating and any mitigating factors which are relevant to the imposition of the death penalty. Aggravating factors may include but need not be limited to those factors set forth in Subsection (b). Mitigating factors may include but need not be limited to the following:

1. the defendant has no significant history of prior criminal activity;

2. the murder was committed while the defendant was under the influence of extreme mental or emotional disturbance, although not such as to constitute a defense to prosecution;

3. the murdered individual was a participant in the defendant's homicidal conduct or consented to the homicidal act;

4. the defendant acted under the compulsion of threat or menace of the imminent infliction of death or great bodily harm;

5. the defendant was not personally present during commission of the act or acts causing death.

(d) *Separate sentencing hearing.* Where requested by the State, the court shall conduct a separate sentencing proceeding to determine the existence of factors set forth in Subsection (b) and to consider any aggravating or mitigating factors as indicated in Subsection (c). The proceeding shall be conducted:

1. before the jury that determined the defendant's guilt; or

2. before a jury impanelled for the purpose of the proceeding if:

A. the defendant was convicted upon a plea of guilty, or

B. the defendant was convicted after a trial before the court sitting without a jury; or

C. the court for good cause shown discharges the jury that determined the defendant's guilt; or

3. before the court alone if the defendant waives a jury for the separate proceeding.

(e) *Evidence and Argument.* During the proceeding any information relevant to any of the factors set forth in Subsection (b) may be presented by either the State or the defendant under the rules governing the admission of evidence at criminal trials. Any information relevant to any additional aggravating factors or any mitigating factors indicated in Subsection (c) may be presented by the State or defendant regardless of its admissibility under the rules governing the admission of

evidence at criminal trials. The State and the defendant shall be given fair opportunity to rebut any information received at the hearing.

(f) *Proof.* The burden of proof of establishing the existence of any of the factors set forth in Subsection (b) is on the State and shall not be satisfied unless established beyond a reasonable doubt.

(g) *Procedure—Jury.* If at the separate sentencing proceeding the jury finds that none of the factors set forth in Subsection (b) exists, the court shall sentence the defendant to a term of imprisonment under Chapter V of the Unified Code of Corrections.[1] If there is a unanimous finding by the jury that one or more of the factors set forth in Subsection (b) exist, the jury shall consider aggravating and mitigating factors as instructed by the court and shall determine whether the sentence of death shall be imposed. If the jury determines unanimously that there are no mitigating factors sufficient to preclude the imposition of the death sentence, the court shall sentence the defendant to death.

Unless the jury unanimously finds that there are no mitigating factors sufficient to preclude the imposition of the death sentence the court shall sentence the defendant to a term of imprisonment under Chapter V of the Unified Code of Corrections.

(h) *Procedure—No Jury.* In a proceeding before the court alone, if the court finds that none of the factors found in Subsection (b) exists, the court shall sentence

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[1]Section 1005-1-1 et seq. of this chapter.

the defendant to a term of imprisonment under Chapter V of the Unified Code of Corrections.

If the Court determines that one or more of the factors set forth in Subsection (b) exists, the Court shall consider any aggravating and mitigating factors as indicated in Subsection (c). If the Court determines that there are no mitigating factors sufficient to preclude the imposition of the death sentence, the Court shall sentence the defendant to death.

Unless the court finds that there are no mitigating factors sufficient to preclude the imposition of the sentence of death, the court shall sentence the defendant to a term of imprisonment under Chapter V of the Unified Code of Corrections.

(i) *Appellate Procedure.* The conviction and sentence of death shall be subject to automatic review by the Supreme Court. Such review shall be in accordance with rules promulgated by the Supreme Court.

(j) *Disposition of reversed death sentence.* In the event that the death penalty in this Act is held to be unconstitutional by the Supreme Court of the United States or of the State of Illinois, any person convicted of murder shall be sentenced by the court to a term of imprisonment under Chapter V of the Unified Code of Corrections.

In the event that any death sentence pursuant to the sentencing provisions of this Section is declared unconstitutional by the Supreme Court of the United States or of the State of Illinois, the court having jurisdiction over a person previously sentenced to death shall cause the defendant to be brought before the court, and the court shall sentence the defendant to a term of imprisonment under Chapter V of the Unified Code of Corrections.

Opposition

Office - Supreme Court, U.S.
FILED
MAY 24 1982
ALEXANDER L. STEVAS,

No. 81-1776

In the Supreme Court of the United States

OCTOBER TERM, 1981

CORNELIUS LEWIS,
Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,
Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

TYRONE C. FAHNER
Attorney General
State of Illinois

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the Illinois Death Penalty Act provides the sentencing authority with adequate information and guidance and ensures meaningful appellate review.

II. Whether the invocation of the doctrine of *stare decisis* was properly utilized to affirm the constitutionality of the Illinois Death Penalty Act.

III. Whether the specific statutory aggravating and mitigating factors of the Illinois Death Penalty Act provide the State with sufficient standards to select those prosecuted for capital offenses.

IV. Whether the petitioner received effective assistance of counsel at trial and at the sentencing hearing.

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No. 81-1776

In the Supreme Court of the United States

OCTOBER TERM, 1981

CORNELIUS LEWIS,
Petitioner,

VS.

PEOPLE OF THE STATE OF ILLINOIS,
Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

OPINION BELOW

The instant Petition seeks review of the decision of the Supreme Court of Illinois which affirmed both the petitioner's convictions for murder, armed robbery, and aggravated kidnapping, and the death sentence imposed on the murder conviction. The decision is reported at 88 Ill. 2d 129, 430 N.E.2d 1346 (1981), and was included as Exhibit A of the petitioner's Appendix.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition. However, as treated more fully in the argument contained herein, respondent does not believe that the petitioner has shown any reason for this Court to exercise its sound discretion to grant his Petition for a Writ of Certiorari.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant portions of the Sixth, Eighth and Fourteenth Amendments to the United States Constitution and the Illinois Death Penalty Act, *Ill. Rev. Stat.* 1977, ch. 38, sec. 9-1 *et seq.*, are contained in Exhibit C of the petitioner's Appendix.

STATEMENT OF THE CASE

A. TRIAL COURT

1. Pre-Trial

On February 21, 1979, the petitioner, Cornelius Lewis, and his sister, Bernice Lewis, were indicted by the Macon County grand jury for murder, armed robbery, and aggravated kidnapping. (Vol. I. 20)[1] The petitioner was arraigned on March 13, 1979, at which time Scott Diamond, the Macon County Public Defender, was appointed as his counsel. (Vol. I. 278-279; Arr., 4-5) The petitioner entered a plea of not guilty to all three charges. (Vol. I. 278)

Diamond, who already was representing Bernice Lewis, was allowed to withdraw as the petitioner's counsel as the dual representation presented a conflict of interest. (Vol. I. 40, 278-279) Mr. Kenneth Kinser was eventually appointed to represent the petitioner. (Vol. I. 279) Willie Sangster, a third defendant whose indictment had been consolidated with the Lewises', was granted a continuance, thereby procuring a trial separate from that of the petitioner and his sister.[2]

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[1] In the Supreme Court of Illinois, the volumes of the record were numbered I-XIII. Volume I is the common law record. The arraignment record is found between pages 33 and 34 of the common law record and is referred to as "Arr." in this brief.

[2] Sangster was ultimately convicted on accountability principles for murder, armed robbery, and aggravated kidnapping, and sentenced to consecutive terms of forty, thirty, and fifteen years respectively. Although the convictions were affirmed, the state appellate court found that the imposition of consecutive sentences was improper. *People v. Sangster*, 95 Ill. App. 3d 357, 420 N.E.2d 181 (4th Dist. 1981). The propriety of the Appellate Court ruling is presently pending before the Supreme Court of Illinois. *People v. Sangster*, No. 55032 (*leave to appeal granted*, October 19, 1981).

2. Trial

Maurice Farris and Sangster, residents of Decatur, Illinois, planned the robbery of the Citizens National Bank of Decatur, Illinois, on the weekend before the petitioner and his sister arrived from out of state. (Vol VI. 296-297, 308, 319)[3] The petitioner and his sister arrived in Decatur late Tuesday morning (December 12, 1978) (Vol VI. 329-330) Farris informed them that their role in the bank robbery was to obtain an extra car and then rob the tellers. (Vol. VII. 338) He indicated that he would assist in getting the extra car, pick them up after the robbery, and take them to a safe location. (Vol. VII. 338) Farris drew a diagram of the plan and explained the number of tellers and guards, the bank procedure, and the traffic flow. (Vol. VII. 339)

The petitioner and his sister asked several questions including how many guards there would be, how much money was involved, whether Farris thought there would be any shooting, where they would stay after the robbery, when the money would be divided, where the other car would come from, and what Sangster's role in the robbery was. (Vol. VII. 340-341) Later that day, Sangster told the petitioner that it would be an easy job, that the guard would not give them any trouble because he wanted "to live to see his grandchildren grow up," how many guards there would be, and that it would take them a maximum of 5 minutes to get from the bank to the house where they would be staying. (Vol. VII. 343)

The original plan was to rob the bank the next day, Wednesday, December 13. (Vol. VII. 345) However, on that

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[3] Farris testified for the State and received immunity from prosecution. (Vol. VII. 412)

morning, Farris and the Lewises were unable to steal a car. Instead, the three went to the bank in downtown Decatur so that Farris could show them the bank procedures. (Vol. VII. 354-357) That night, the petitioner and his sister stayed at the home of Margaret Morgan on Greenwood Avenue in Decatur. (Vol. VIII. 498-500)

On Thursday morning, Farris picked up the petitioner and his sister at the Morgan residence. (Vol. VII. 365) Both of the Lewises wore stocking caps which had eye slits cut in them. (Vol. VII. 366-369) They asked Farris to pull into the parking lot of the Kinder-Care Learning Center. (Vol. VII. 373)

Mary Comerford had just dropped her child off at the day care center. (Vol. V. 40-45) She returned to her car and was confronted by the petitioner. He was wearing a black ski mask and pointing a gun at her face. (Vol. V. 47; Vol. VII. 375-376) The petitioner first directed her to drive on various streets and later drove the car himself. (Vol. V. 47-48) Eventually, he stopped the car and taped Mrs. Comerford's eyes and wrists and put her on the floor of the back seat placing a stroller on top of her. (Vol. V. 50-51) The petitioner then proceeded to a parking lot where he forced Mrs. Comerford into the trunk of the car and bound her hands and feet with rope. (Vol. V. 52-53; Vol. VII. 375-385) The petitioner and his sister then drove to the bank in Mrs. Comerford's car. (Vol. VII. 389) Farris went in the petitioner's car to the location where he was to meet the Lewises. (Vol. VII. 389-396)

Kaye Pinkley, Carol Woodcock, Ida King, Kathy Johnson, and Theresa Carnahan were the five bank tellers who witnessed the murder of Donald Bivens. The tellers arrived at the bank just before 8:00 a.m. on December 14, 1978, in preparation to work at the drive-up facility. (Vol. V. 66) Each picked up a briefcase containing money and other items including name tags and teller stamps with individual identifying numbers. (Vol. V. 67, 79-82, 143)

The tellers were escorted to the bank van by their security guard, Donald Bivens. They entered the van and placed their briefcases behind the rear seat. (Vol. V. 72) Donald Bivens was in the driver's seat, about to start the ignition, when the passenger door was suddenly pulled open. (Vol. V. 124) A tall, slender, black man dressed in dark clothing, a ski mask, and gloves, reached across Kaye Pinkley, resting his elbows on Ms. Pinkley's legs. (Vol. V. 74, 110, 131). The man pointed a long-barrelled revolver at Donald Bivens and ordered everyone not to move. (Vol. V. 74) A second robber stood a few steps behind the gunman. (Vol. V. 75)

In the next instant, Mr. Bivens motioned as though reaching for his gun, and the first robber shot him once in the neck. (Vol. V. 75-76). The two robbers then opened the rear door of the van and fled with three of the tellers' briefcases. (Vol. V. 99, 128)

When the Lewises met Farris they were carrying the tellers' briefcases. They entered the car and stayed close to the floor as Farris drove along a pre-arranged escape route. (Vol. VII. 396-400) At the intersection of Union and Main, an ambulance came by. Bernice Lewis asked Farris what the sound was, and Farris said that it was an ambulance siren. When Bernice asked whether the ambulance was going toward the bank, Farris asked what had happened. (Vol. VII. 399) The petitioner said that the guard had gone for his gun, so he had to "burn him." (Vol. VII. 400) Farris dropped them off at Margaret Morgan's home. (Vol. VII. 400)

After running an errand for the petitioner, Ms. Morgan returned home to find the petitioner and his sister in her living room counting money. (Vol. VIII. 611-613) There were also blank money orders, money wrappers and rubberbands. (Vol. VIII. 614) On the same day, Ms. Morgan and Bernice Lewis went to a vacant house in Decatur. There, Bernice Lewis disposed of a yellow pillowcase containing the three

suitcases and other items by placing them in a garbage can. (Vol. VIII. 644-645) The other items included several handguns, bank money orders, money wrappers, and articles of clothing, including two dark colored stocking caps. (Vol. VII. 647-649)

That evening, Ms. Morgan drove the Lewises to the bus station in Davenport, Iowa. (Vol. VIII. 617-621) She received over $1,000 for letting the petitioner and his sister stay at her home and for driving them to Iowa. (Vol. VIII. 622-225) Two or three weeks later, Ms. Morgan and two of her friends returned to the vacant house, retrieved the items out of the garbage can, and took them to a dumpster in Greenwood Manor. (Vol. VIII. 510-522, 650)

Various law enforcement officers found the evidence in a search of the Macon County Landfill. (Vol. VI. 192-221, 251-271; Vol. VIII. 679-683; Vol. IX. B-1-9) Among the items recovered were a Smith and Wesson Model 37, a two-inch .38 caliber pistol, a .38 caliber revolver, serial number 132063, several .38 caliber bullets, two dark blue stocking caps with irregularly-shaped holes, some currency, money orders reading "Citizens National Bank", teller supplies, teller stamps and nametags from the Citizens National Bank, and other items individually identified as belonging to the tellers who were the victims of the armed robbery. (Vol. VI. 192-221, 251-271; Vol. VIII. 679-683; Vol. IX. B-1-9) The .38 caliber Colt revolver, serial number 132063, recovered from the landfill, was registered to the murder victim, Donald Bivens. (Vol. VI. 278) The second .38 caliber pistol was traced as having been "pawned" to the petitioner.

In January, 1979, several agents of the Federal Bureau of Investigation searched Margaret Morgan's house and confiscated $1,100 in currency, one H and R .32 caliber revolver, five live rounds of .357-caliber ammunition, and an expended shell casing. (Vol. VIII. 558-570) A Dan Wesson Arms .357

Magnum revolver serial number 38085, was recovered from Clifford Wilson, a friend of Ms. Morgan. (Vol. VIII. 578-581) Ms. Morgan had found the weapon in the bedroom where the petitioner had slept and taken it to Wilson's residence. (Vol. VIII. 559-561) The elemental composition of the bullet found in the bank van after the robbery (Vol. IX. B-112) was found to be the same or similar to the composition of the lead in the cartridges which were recovered from Ms. Morgan (Vol. VIII. 586-599). Additionally, the characteristics of the bullet found in the van were consistent with those of the barrel of the .357 Magnum. (Vol. X. B. 205-212)

The F.B.I. confiscated $5,000 that the petitioner had given his brother-in-law, Dwight David. (Vol. IX, B 22-32, B 54-60) Some of the currency recovered from Ms. Morgan and Mr. David was matched with an October, 1978, shipment from the Federal Reserve Bank to Citizens National Bank. (Vol. IX. B 11-18) Additionally, the fingerprints of Bernice Lewis and Kathy Johnson, the bank teller, were found on bills given to Ms. Morgan by the petitioner. (Vol. IX. B 49-53, B 116-118, B 121-125)

The jury found the petitioner and his sister guilty of murder, armed robbery, and aggravated kidnapping. (Vol. X. B-244)

3. The sentencing hearing

The State's Attorney requested that further proceedings be held for the purpose of imposing the death penalty upon the petitioner.[4] Accordingly, the same jury was reconvened to

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[4] Bernice Lewis was sentenced to concurrent terms of forty years for murder, thirty years for armed robbery and thirty years for aggravated kidnapping. The convictions and sentences imposed have been affirmed on appeal. *See People v. Lewis,* 88 Ill. 2d 429, 430 N.E.2d 994 (1981), and *People v. Lewis,* No. 15783 (4th Dist. April 13, 1982) (unpublished order of state appellate court).

determine whether aggravating factors existed for which the death sentence could be considered. The jury heard arguments by counsel and was instructed by the court. After deliberations, the jury unanimously found the existence of two aggravating factors, namely, that the petitioner was over the age of eighteen and had committed the murder during the commission of an armed robbery. (Vol. X. B 250-269)

The third phase of the proceedings was held to determine whether there were any mitigating factors sufficient to preclude the imposition of the death sentence. (Vol. X. B 269-297) The evidence in aggravation presented by the state was the petitioner's prior convictions and sentences. His criminal record included a 1965 conviction for attempted felonious assault with a knife, a 1966 conviction for felonious assault with a firearm, a 1966 conviction for second degree robbery, and a 1969 conviction for bank robbery. The petitioner elected not to present any evidence, but rather, relied on closing argument. The jury deliberated and unanimously found that there were no mitigating factor or factors sufficient to preclude the imposition of the death sentence. (Vol. X. B 328)

B. Direct Appeal To The Supreme Court Of Illinois

On direct appeal to the Supreme Court of Illinois, the judgment and sentence were affirmed. *People v. Lewis,* 88 Ill. 2d 129, 430 N.E.2d 1346 (1981). The court carefully reviewed each of the petitioner's contentions and noted that it had repeatedly acknowledged the emphasis by this Court,

> upon the qualitative difference between imprisonment and death as penalties, and the necessity to avoid arbitrary or capricious death sentences by adequately defining capital offenses, by directing

> sentencing discretion, and by providing adequate judicial review.

88 Ill.2d at 164-165, 430 N.E.2d at 1363 (citations omitted). While upholding the constitutionality of the Illinois Death Penalty Act, the reversals of prior death penalty cases demonstrated that the court was not insensitive to the responsibilities involved in their review of capital cases and had not hesitated to vacate death penalties where improperly imposed. However, in the petitioner's case, the court's responsibilities,

> neither require nor permit reversal where no reasonable doubt of guilt exists, no reversible error has occurred, and there is no indication that the jury imposed the penalty on other than a reasoned basis.

88 Ill.2d at 165, 430 N.E.2d at 346.

REASONS FOR DENYING THE WRIT

I.

THE ILLINOIS STATUTE PROVIDING FOR IMPOSITION OF THE DEATH PENALTY IN CERTAIN CASES OF MURDER IS CONSTITUTIONAL, BOTH ON ITS FACE AND AS APPLIED TO THIS PETITIONER.

A. The Illinois Death Penalty Act Conforms To The Requirements Of The United States Constitution By Providing The Sentencing Authority With Adequate Information And Guidance.

The petitioner claims that the Illinois statute providing for imposition of the death penalty in certain cases of murder fails to adequately direct the attention of the sentencing authority

to the individual characteristics of a defendant. Petition at 9-15. In arguing these contentions, the petitioner urges that the statute is unconstitutional for failure to make mandatory the exposure to the sentencing authority of a defendant's social history. The respondent submits that the statutory provisions listing mitigating factors and permitting presentation of any evidence offered in mitigation provides a proper individualized focus on the circumstances and character of the offender.

The Illinois Death Penalty Act, *Ill. Rev. Stat.* 1977, ch. 38, §9-1, establishes a bifurcated procedure to be followed in cases where the State's Attorney requests imposition of capital punishment on a person convicted of murder. This two-step procedure, endorsed by this Court in *Gregg v. Georgia*, 428 U.S. 153 (1976), requires that the trier of fact first decide the issue of guilt or innocence. If an accused is found guilty of murder and the State requests imposition of capital punishment, the second stage commences. The sentencing authority, which may be either a judge or a jury at the election of the defendent, hears evidence in aggravation and mitigation of sentence. The sentencing authority may then either impose the death penalty or sentence the convict to a term of imprisonment. If capital punishment is ordered the defendant receives an automatic appeal to the Supreme Court of Illinois.

The petitioner initially contests the constitutionally of the second stage of the proceedings. The Act states that the sentencing authority shall consider any mitigating factors which are relevant to the imposition of the death penalty. It sets forth certain specific factors, including circumstances of the defendant and of the crime, and prescribes that the mitigating factors to be considered "may include but need not be limited to" those thus delineated. *Ill. Rev. Stat.* 1977, ch. 38, §9-1(c). It further provides that any information relevant to the mitigating factors may be presented regardless of its

normal admissibility under the rules of evidence, and that the defendant may rebut the evidence presented by the State. *Ill. Rev. Stat.* 1977, ch. 38, §9-1(e). A procedure by which a defendant could more completely enlighten the sentencing authority concerning his "individual circumstances" and "individual characteristics" is difficult to imagine. That any individual defendant may determine that it is not in his interest to avail himself of this opportunity does not render the statute constitutionally infirm.

In the present case, the record reveals that petitioner was afforded a full and fair opportunity to present to the sentencing jury any information he deemed potentially helpful to his cause. (Vol. X. B269-297) He declined all offers, including his right of allocution. (Vol. X. B278-279) Now that he has seen the unfavorable result of his strategy, petitioner claims that the statute is unconstitutional for failure to *demand* the extraction of social information from him.

It is clear that the statute, as presently formulated, violates no constitutional mandate, particularly those cited by the petitioner in his brief. The alternative suggested by the petitioner, that a defendant be required to present his social history regardless of his own determination that it may be harmful to his cause, is potentially violative of a defendant's constitutional rights. See *Gardner v. Florida*, 430 U.S. 349 (1977). As recognized in *Estelle v. Smith*, ____ U.S. ____, 101 S.Ct. 1866, 1873 (1981):

> Just as the Fifth Amendment prevents a criminal defendant from being made "'the deluded instrument of his own conviction,'" . . . it protects him as well from being made the "deluded instrument" of his own execution.

Unlike the circumstances in *Eddings v. Oklahoma*, ____ U.S. ____, 102 S.Ct 969 (1982), the respondent has not precluded

the sentencing authority from considering a mitigating factor, nor has the sentencing authority, refused to consider, as a *matter of law*, relevant mitigating evidence. By allowing the sentencing authority to consider any relevant evidence, the respondent has protected the petitioner and similarly situated defendants from the arbitrary and capricious imposition of the death sentence. *Lockett v. Ohio,* 438 U.S. 586, 607 (1978); *Gregg*, 428 U.S. at 196-197.

B. Direct Review Of Death Sentences By The Supreme Court Of Illinois Prevents Capital Punishment From Being Arbitrarily Imposed And Provides Meaningful Appellate Review.

The petitioner also contends that the Illinois appellate review procedures for death penalty cases are inadequate because the death penalty statute does not provide for comparison review or assure that the proper factors of aggravation and mitigation will be disclosed by the record. Petition at 9-15. However, direct review of all capital cases to the Supreme Court of Illinois and the availability of the entire trial court record for the court's consideration ensures meaningful appellate review.

The appropriate inquiry when analyzing a state appellate review procedure is whether that process "serves as a check against the random or arbitrary imposition of the death penalty." *Gregg*, 428 U.S. at 206. Prompt judicial review afforded by a court with statewide jurisdiction provides "a means to promote the evenhanded, rational and consistent imposition of sentences." *Jurek v. Texas*, 428 U.S. 262, 276 (1976); *See also, Profitt v. Florida*, 428 U.S. 242, 258-259 (1976).

The Illinois Constitution, art. IV, §4(b), the Death Penalty Act, *Ill. Rev. Stat.* 1977, ch. 38, §9-1(i), and Supreme Court Rule 603, (*Ill. Rev. Stat.* 1979, ch. 110A, §603), all provide for

direct appeal to the Supreme Court of Illinois of any conviction for which the penalty has been imposed. The entire trial court record is available to the reviewing court for examination, Supreme Court Rule 342(d), (*Ill. Rev. Stat.* 1979, ch. 110A, §342), thus disclosing the evidence which motivated the imposition of the death sentence.

The petitioner cannot complain that he does not know what factors the sentencing authority considered in imposing punishment. The transcript of the trial and sentencing hearing provided the Supreme Court of Illinois with a full opportunity to determine if the proper mitigating and aggravating factors were correctly applied by the sentencing authority.

Finally, the petitioner's fears that the arbitrary and capricious imposition of the death penalty may escape the attention of the Supreme Court of Illinois is belied by that court's own experience in capital cases. On frequent occasion, the court has detected some defect in the record of a capital case which resulted in the vacation or outright reversal of a death sentence. *See People v. Walker*, 84 Ill. 2d 512, 419 N.E.2d 1167 (1981) (death sentence vacated because defendant was misinformed of the maximum penalty before pleading guilty); *People v. Gleckler*, 82 Ill. 2d 145, 411 N.E.2d 849 (1980) (death penalty reversed because disproportionate); *People v. Carlson*, 79 Ill. 2d 564, 404 N.E.2d 233 (1980) (death sentence reversed where record demonstrated that defendant did not have a "malignant heart"); *People v. Brownell*, 79 Ill. 2d 508, 404 N.E.2d 181 (1980) (death penalty vacated after improper consideration of aggravating factor). Indeed, of the first nine cases decided by the Illinois Supreme Court only three death sentences have been affirmed. These decisions conclusively demonstrate that the Supreme Court of Illinois has never abdicated its constitutional responsibility in capital cases to ensure the fair and even-handed imposition of the death penalty.

II.

THE INVOCATION OF THE DOCTRINE OF *STARE DECISIS* WAS A PROPER ACCEPTANCE OF THE PRINCIPLE THAT CIRCUMSTANCES WHICH WARRANT CHANGES IN THE LAW DO NOT INCLUDE CHANGES IN THE PERSONNEL OF A RULING COURT.

The petitioner argues that the invocation of the doctrine of *stare decisis* to permit his death sentence to stand violated his rights under the Eighth and Fourteenth Amendments. Petition at 15-16. This contention arises from the following facts:

The discretion of the prosecutor to request capital punishment under the Illinois Death Penalty Act was upheld by the Supreme Court of Illinois in *People ex rel. Carey v. Cousins*, 77 Ill. 2d 531, 397 N.E.2d 809 (1979), *cert. denied*, 445 U.S. 953 (1980). Justice Ryan was joined by Justices Goldenhersh and Clark in dissenting from the the majority opinion. Following that decision, the three dissenting justices acquiesed in the majority's view on the issue of the prosecutor's ability to request a death penalty hearing, *See People v. Brownell*, 79 Ill. 2d 508, 404 N.E.2d 181 (1980), and rejected further attacks as to the constitutionality of the act. *See People v. Walker*, 84 Ill. 2d 512, 419 N.E.2d 1167 (1981); *People v. Gleckler*, 82 Ill. 2d 145, 411 N.E.2d 849 (1980); *People v. Carlson*, 79 Ill. 2d 564, 404 N.E. 2d 233 (1980); *People v. Greer*, 79 Ill. 2d 103, 402 N.E.2d 203 (1980). When the petitioner's case was decided, Justice Simon had replaced Justice Kluczynski, an original member of the *Cousins* majority. Although Justice Simon dissented in the petitioner's case, the three dissenters in *Cousins* refused to overturn the statute simply because a change in personnel had occured. *People v. Lewis*, 88 Ill. 2d 129, 430 N.E.2d 1346 (1981) (concurring opinions of Justices Goldenhersh, Ryan & Clark).

As noted by Mr. Justice Frankfurter, to yield to personal predilections would be to act willfully "in the sense of enforcing individual views instead of speaking humbly as the voice of law by which society presumably consents to be ruled." Frankfurter, "The Supreme Court in the Mirror of Justices," 105 U.Pa.L.Rev. 781, 794 (1957). The use of *stare decisis* by the three Illinois justices was an acceptance of the fundamental concept that ours is a government of law and not of men. As noted by Justice Clark, circumstances significant enough to bring about changes in the law do not include changes in personnel but do include "those which render an existing rule of law impracticable or unjust and which will bring about a sensible and just result." *Lewis, supra* 88 Ill. 2d at 169, 430 N.E.2d at 1365. (Justice Clark, concurring).

As outlined in Argument III, *infra*, the discretion of the prosecutor under the Illinois Death Penalty Act does not result in the arbitrary imposition of capital punishment. Under these circumstances, the invocation of the doctrine of *stare decisis* was a proper acceptance of established legal principles.

III.

WHERE A DEATH PENALTY STATUTE PROVIDES STANDARDS THAT SUFFICIENTLY FOCUS ON THE PARTICULARIZED CIRCUMSTANCES OF THE CRIME AND THE DEFENDANT, THE DISCRETION OF THE PROSECUTOR TO REQUEST THE DEATH PENALTY OR SHOW MERCY DOES NOT RESULT IN THE ARBITRARY IMPOSITION OF CAPITAL PUNISHMENT.

The petitioner contends that the Illinois Death Penalty Act is invalid on its face because it lacks necessary standards to assure its evenhanded application by prosecutors across the

State of Illinois. Petition at 17-18. However, when the statute is analyzed, it is clear that the specific statutory aggravating and mitigating factors provide sufficient standards to prevent the uneven imposition of capital sentences.

This Court, in *Gregg v. Georgia*, 428 U.S. 153 (1976), rejected an argument that prosecutors had "unfettered authority" to select those prosecuted for capital offenses. In upholding the discretion to show mercy at any stage of the proceedings, this Court stated that:

> Nothing in any of our cases suggests that the decision to afford an individual defendant mercy, violates the Constitution. *Furman* [*Furman v. Georgia*, 408 U.S. 238 (1972)] held only that in order to minimize the risk that the death penalty would be imposed on a capriciously selected group of offenders, the decision to impose it had to be guided by standards so that the sentencing authority would focus on the particularized circumstances of the crime and the defendant.

428 U.S. at 199. Thus the Georgia prosecutor's power to charge a capital offense was confined by the statutory definition of that offense, with the decision depending upon his estimate of what testimony and other evidence would be available and its persuasive effect.

Despite the petitioner's contention, the enumerated statutory aggravating and mitigating factors do provide Illinois prosecutors with standards by which to make the decision to request or not request a death penalty hearing. A murder can be a capital offense only if it falls within one of the classes described by the aggravating factors. *Ill. Rev. Stat.* 1977, ch. 38, §9-1(b). The statutory mitigating factors, §9-1(c), must be the starting point for any decision to show mercy. Even when the State requests a death penalty hearing

in the case of any particular defendant, a judge or jury must conduct the statutorily prescribed hearing, and consider the statutorily prescribed standards in determining whether or not the death penalty should be imposed. Moreover, the Illinois prosecutor's judgment will be better informed than under the Georgia procedure outlined in *Gregg*, "for he need not make the final decision until after the conclusion of trial, when he will have evaluated the testimony and other evidence which was in fact presented." *People ex rel. Carey v. Cousins*, 77 Ill. 2d 531, 397 N.E.2d 809, 815 (1979), *cert. denied*, 445 U.S. 953 (1980).

The petitioner asserts that prosecutors will exercise their discretionary power to request the death penalty not only arbitrarily, but maliciously, owing to personal or local community prejudices. However, as a matter of federal constitutional law, the concurring opinion of Justices White, Burger and Rehnquist in *Gregg*, 328 U.S. at 224-25, is instructive:

> Absent facts to the contrary it cannot be assumed that prosecutors will be motivated in their charging decision by factors other than the strength of their case and the likelihood that a jury would impose the death penalty if it convicts. Unless prosecutors are incompetent in their judgments the standards by which they decide whether to charge a capital felony will be the same as those by which the jury will decide the questions of guilt and sentence. Thus defendants will escape the death penalty through prosecutorial charging decisions only because the offense is not sufficiently serious; or because the proof is insufficiently strong. This does not cause the system to be standardless any more than the jury's decision to impose life imprisonment on a defendant whose crime is deemed insufficiently serious or its decision to acquit someone who is probably guilty

but whose guilt is not established beyond a reasonable doubt.

If the prosecutor does not have the discretion to choose which defendants should be considered for the death penalty upon conviction, the State is left with two alternatives. The first would be to simply abolish capital punishment in Illinois, despite the fact that the Constitution does not require such abolition (*Gregg*, 428 U.S. at 187) and without regard to the will of the people of this State as expressed by their elected representatives, who drafted §9-1. The other alternative would be to totally remove all elements of prosecutorial discretion in the sentencing of convicted murderers by making capital punishment the mandatory penalty for certain offenses, an alternative already condemned by this Court as unconstitutional. *Roberts v. Louisiana*, 428 U.S. 325 (1976).

The Illinois Death Penalty Act serves as a practical, just, and constitutional compromise between these extreme positions. It fulfills the need for standards mandated by *Furman* and *Gregg* by requiring the sentencing authority to focus on the particularized circumstances of the crime and the defendant. The granting of mercy to individual defendants at any stage of the proceedings does not violate the Eighth and Fourteenth Amendments.

IV.

THE PETITIONER HAS NOT PRESENTED A VIABLE INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM THAT MERITS REVIEW ON WRIT OF CERTIORARI.

A. The Illinois Standard For Reviewing Ineffective Assistance Of Counsel Claims Comports With This Court's Decision In *McMann v. Richardson* And Sufficiently Protects The Constitutional Rights Of Defendants Accused Of Capital Offenses.

The Petitioner asks this Court to grant certiorari on the grounds that a uniform constitutional standard should be established for reviewing claims of ineffective assistance of counsel. Petition at 18-25. The respondent submits that the Illinois standard for reviewing Sixth Amendment claims of ineffective assistance of counsel complies with the guidelines established by this Court.

"It has long been recognized that the right to counsel is the right to the effective assistance of counsel." *McMann v. Richardson*, 397 U.S. 759, 771, n.14 (1970). *McMann* held that a counselled guilty plea, although immune from collateral attack on the ground of involuntariness, might be challenged if counsel's actions fell below "the range of competence demanded of attorneys in criminal cases." 397 U.S. at 770-771. The Court reserved for the lower courts the task of articulating a more specific minimum standard of attorney competence in criminal cases.

> [W]e think the matter, for the most part should be left to the good sense and discretion of the trial courts with the admonition that if the right to counsel guaranteed by the Constitution is to serve its

> purpose, defendants cannot be left to the mercies of incompetent counsel and that judges should strive to maintain proper standards of performance by attorneys who are representing defendants in criminal cases in their courts.

McMann, 397 U.S. at 771.

For the petitioner to demonstrate incompetency of counsel under Illinois standards, he had to establish (1) actual incompetence of counsel, as reflected by the manner of carrying out his duties as a trial attorney, and (2) substantial prejudice resulting therefrom, without which the outcome would probably have been different. *People v. Greer*, 79 Ill. 2d 103, 120-121, 402 N.E.2d 203, 211 (1980). As mandated by *Cuyler v. Sullivan*, 446 U.S. 335 (1980), this standard is applied in Illinois to both appointed and retained counsel. *See People v. Talley*, 97 Ill. App. 3d 439, 422 N.E.2d 1084 (1st Dist. 1981). The requirement of affirmative proof of prejudice does not impose an undue burden on the petitioner. *McQueen v. Severson*, 498 F.2d 207, 218-220 (8th Cir. 1977); *United States ex rel. Green v. Rundle*, 434 F.2d 1112, 1115 (3rd Cir. 1970); *See generally Chambers v. Maroney*, 399 U.S. 42 (1970).

The specific Illinois standard for reviewing ineffective assistance of counsel claims conforms with the general guidelines established in *McMann*.[5] Accordingly, the petitioner has not presented an important question of federal law that merits review on writ of certiorari[6].

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[5] This Court recently denied certiorari in *McMurtry v. Illinois*, No. 81-1308 (April 26, 1982), where the Illinois standard for reviewing competence of counsel was attacked on similar grounds.

[6] The petitioner also suggests that a higher standard of competence be constructed for evaluating counsel's actions in death penalty cases. In this regard, suffice to say that:

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B. This Case Is Inappropriate For Review As The Record Does Not Reveal Conduct By Counsel Amounting To A Deprivation Of The Petitioner's Sixth Amendment Rights Under Any Competency Standard.

The petitioner bases his claim of ineffective assistance of counsel on a number of grounds including the decision of counsel to forego making an opening statement, the limited cross-examination of witnesses, the failure to make certain objections, the decision not to have the petitioner testify, the supposed mishandling of a motion for a mistrial, and the decision not to present evidence in mitigation at the death penalty hearing. However, the petitioner, through a selective omission of relevant facts, has presented this Court with an inaccurate and misleading picture of his trial attorney's actions.

In analyzing the representation provided to the petitioner by Mr. Kenneth Kinser, petitioner's court-appointed attorney, it is imperative that this Court acknowledge the difficulty of the task. As outlined in the respondent's "Statement of the Case," the evidence presented against the petitioner was overwhelming. Through the liberal discovery provisions allowed in criminal cases, it can be assumed that Mr. Kinser was well aware before trial of the tenuous position confronting the petitioner.

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> If this principle remains operative at all, it exists only insofar as appellate courts take the matter more seriously where a capital penalty is involved. There is no rule requiring a higher quality of assistance where the offense charged is more serious.

Brody & Albert, "Ineffective Representation as a Basis for Relief from Conviction: Principles for Appeliate Review", 14 *Colum. J.L. Soc. Prob.* 1, 18, n.56 (1977)

Prior to trial, the petitioner's trial counsel filed nine separate pre-trial motions and memoranda. (Vol. I. 46-68, 82-84, 99-101) The substance of these documents, as well as Mr. Kinser's oral argument on the motions (Vol. II. 20-21, 46-47, 60, 74-75), demonstrate Mr. Kinser's acute awareness of the relevant issues that had be to asserted in order to protect the petitioner's rights.

The theory pursued by petitioner's trial counsel was to admit that the offenses were committed, but deny that his client was the perpetrator. Thus, Kinser, in his cross-examinations, dramaticized the inability of the occurrence witnesses to positively identify their assailants (Vol. V. 86-87, 117; Vol. VI. 156-157, 165-166), and the inherently suspect nature of the testimony of Maurice Farris and Margaret Morgan (Vol. VII. 434-442; Vol. VIII. 674-676).

The adequacy of the representation provided to the petitioner is further illuminated by counsel's prompt motion for a mistrial made during the testimony of F.B.I. Agent Michael Neville. Immediately upon Agent Neville's statement that he met the petitioner when the petitioner was visiting his probation officer, Mr. Kinser voiced his objection. (Vol. IX, B. 74-75) The court offered to grant counsel's motion for a mistrial and provide the petitioner with the opportunity to be re-tried before a jury not exposed to the remark. (Vol. IX. B. 82) The petitioner himself declined the option for a re-trial and chose to proceed. Mr. Kinser adhered to his client's desire and withdrew the motion for a mistrial. (Vol. IX. B. 98-99) The court then instructed the jury to disregard Mr. Neville's remark. (Vol. IX. B. 105-106)

The petitioner characterizes the granting of mistrial as "conditional " because it would have likely resulted in the petitioner being later tried with Willie Sangster, whose trial originally had been consolidated with that of the Lewises, but then continued to the following month. As noted by the

Supreme Court of Illinois, it is an overstatement for the petitioner to assert that the judge placed a "condition" on the grant of mistrial. "The judge, . . . made it clear that motions for severance would be considered later is it appeared that a joint trial would prejudice [petitioner]." *People v. Lewis*, 88 Ill. 2d 129, 157, 430 N.E.2d 1346, 1359 (1981).

Although Mr. Kinser elected not to present evidence during the death penalty proceedings, he strenuously argued that there was mitigating evidence (that the petitioner acted under threat of imminent danger, i.e., the bank guard reaching for his gun) and that the jury should spare the life of his client. *Compare, State v. Myles*, 389 So.2d 12 (La. 1980) (counsel did not ask jury to spare defendant's life). The petitioner was advised, in open court, of his right of allocution. In the petitioner's presence, counsel indicated that the petitioner chose to forego that right. (Vol. X. B. 278-279)

The decisions not to have the petitioner testify during the proceedings and to decline to present evidence at the sentencing hearing, concern strategical or tactical decisions, the propriety of which will not be scrutinized. *See United States v. Ruben*, 433 F.2d 442, 445 (5th Cir. 1970), *cert. denied*, 401 U.S. 945 (1971); *Henderson v. Cardwell*, 426 F.2d 150 (6th Cir. 1970). Furthermore, the failure of the petitioner to expand the trial court record through any post-conviction proceedings, precludes a substantive attack of counsel's decisions. *See People v. Stephany*, 46 Ill. 2d 153, 263 N.E.ad 83 (1970) (claim of inadequacy of trial counsel involving matters not resting exclusively within the trial record can be properly be brought by way of post-conviction petition)[7].

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[7] The petitioner cites *People v. Frierson*, 25 Cal. 3d 142, 599 P.2d 587 (1979), for the proposition that he was deprived of his Sixth Amendment right to counsel. In *Frierson*, the court found ineffective assistance of

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The right to effective representation is not a right to success. *See MacKenna v. Ellis*, 280 F.2d 592, 599 (5th Cir. 1960), *modified on another ground*, 289 F.2d 928 (*en banc*), *cert. denied*, 368 U.S. 877 (1961). Mr. Kinser filed the necessary pre-trial motions, cross-examined witnesses when necessary, relayed to the petitioner the State's offer to recommend a sixty-year sentence in exchange for a guilty plea, refused to have alleged alibi witnesses testify for the petitioner when the witnesses could not agree as to the relevant dates and times, and effectively argued for the petitioner's innocence and for his life. The record, as it now stands before this Court, does not constitute ineffective assistance of counsel under *any* standard proposed by the petitioner.

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counsel where trial counsel presented neither a tenable diminished capacity defense at the guilt phase nor any evidence at the penalty phase. *Frierson* is clearly distinguishable from the petitioner's case on its facts. The trial record in *Frierson* had been supplemented by means of a petition for writ of habeas corpus with the petition based on alleged ineffective representation. Incompetence of trial counsel was not demonstrated on the face of the appellate court record but rather through the pleadings and affidavits submitted in the post-conviction proceeding which: (1) demonstrated counsel's failure to adequately investigate and prepare a diminished capacity defense; and (2) revealed materials that conceivably could have mitigated the defendant's conduct. 599 P.2d at 595-601. The record in this case contains no affidavits or declarations that would indicate that Mr. Kinser failed to pursue available defenses or that there was mitigating evidence which should have been presented.

CONCLUSION

For the foregoing reasons, the respondent requests that the Petition for a Writ of Certiorari be denied.

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No. 81-1776

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

CORNELIUS LEWIS,

Petitioner,

v.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Illinois

BRIEF AS AMICI CURIAE IN SUPPORT OF PETITIONER'S PETITION FOR CERTIORARI

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QUESTION PRESENTED

Whether the standardless, post-charging discretion given to Illinois prosecutors to convene a death penalty hearing in murder cases violates the Eighth and Fourteenth Amendments?

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INTEREST OF THE *AMICI CURIAE**

The Office of the Public Defender of Cook County bears the primary responsibility for the representation of the indigent accused in Cook County. By virtue of that responsibility, the Public Defender currently represents nine clients who have been sentenced to death and whose appeals are pending in the Illinois Supreme Court as

* All parties of record in this case have consented pursuant to Supreme Court Rule 36.2 to the filing of this amici brief in support of petitioner. These consents are filed herewith.

well as hundreds of others who face potential death sentences. The issue raised in the brief for *amici curiae* directly affects each of those clients.

The Office of the State Appellate Defender represents indigent defendants on appeal statewide, including many sentenced to death. The issue raised in the brief for *amici curiae* directly affects those clients who have been sentenced to death.

SUMMARY OF ARGUMENT

The Illinois Death Penalty is unique. The death sentence hearing does not follow automatically from a conviction of capital murder. Rather, the prosecutor is granted the discretion under section 9-1(d) of the statute to convene a death sentence hearing after conviction. Section 9-1(d) is standardless, providing only

> Where requested by the State, the court shall conduct a separate sentencing proceeding to determine . . . (whether the death penalty shall be imposed). Ill. Rev. Stat., 1977, Ch. 38, par. 9-1(d).

Such discretion not only is standardless, it also is not a component of the traditional charging discretion of the prosecutor and hence is avoidable, unlike the unavoidable charging discretion approved by this Court in *Gregg v. Georgia*, 428 U.S. 153 (1976). Such standardless, avoidable discretion in the capital sentencing process has not been reviewed by this Court. Because that discretion fails to "minimize the risk of arbitrary and capricious" imposition of the death penalty, *Gregg*, 428 U.S. at 189, the Illinois Death Penalty Statute violates the Eighth and Fourteenth Amendments.

REASONS FOR GRANTING THE WRIT

THE ILLINOIS DEATH PENALTY STATUTE VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS BY REQUIRING PROSECUTORS TO EXERCISE STANDARDLESS DISCRETION AT A CRUCIAL STAGE OF THE PROCEEDINGS.

The Illinois death penalty statute is unique. It is the only death statute that directs the prosecutor to exercise discretion to decide who shall be spared from the ultimate penalty during the middle of a death penalty proceeding. In every other state, a death penalty hearing *automatically* follows the conviction.

After a conviction for murder, a death penalty hearing can be held only "[w]here requested by the State." Ill. Rev. Stat., 1977, ch. 38, § 9-1(d). The Supreme Court of Illinois recognized that this statutory language places the decision on whether to convene a death hearing solely and squarely in the hands of the Illinois prosecutor. *People ex rel. Carey v. Cousins*, 77 Ill. 2d 531, 397 N.E. 2d 809 (1979).

Four of the seven Justices now sitting on the Supreme Court of Illinois believe that the Illinois Statute violates the Eighth Amendment. Yet, that Court refused to vacate petitioner's death sentence.

In the *Cousins* case, three Justices—Ryan, Clark, and Goldenhersh—joined in a dissent. All three opined that giving the Illinois prosecutor the crucial decision, without any guiding standards, of who shall be spared from the ultimate penalty, violated the Eighth Amendment. A fourth, Mr. Justice Simon, adopted this position in the present case.* Although the three *Cousins* dissen-

* Justice Simon was not sitting on the Court in November, 1979, when *Cousins* was decided.

ters reaffirmed their views in the present case, each refused to join Justice Simon for reasons ranging from *stare decisis* to reliance that this Court will review this case. *People v. Lewis*, 88 Ill. 2d 129 (1982) (Chief Justice Goldenhersh and Justices Ryan and Clark, concurring).

It is clear from this Court's decisions that four of the seven Illinois Supreme Court Justices are correct in their view that the statute is unconstitutional. This Court in *Gregg v. Georgia*, 428 U.S. 153 (1976), stated:

> While *Furman* did not hold that the infliction of the death penalty *per se* violates the Constitution's ban on cruel and unusual punishment, it did recognize that the penalty of death is different in kind from any other punishment imposed under our system of criminal justice. Because of the uniqueness of the death penalty, *Furman* held that it could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner. 428 U.S. at 188.

Applying *Furman v. Georgia*, 408 U.S. 238 (1972), to the statutes being reviewed, this Court in *Gregg* held:

> *Furman* mandates that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to *minimize the risk of wholly arbitrary and capricious action.* (Emphasis added) 428 U.S. at 189.

In Illinois, the prosecutor has the unfettered discretion to decide whether to convene a death penalty hearing. The failure to "suitably direct" the prosecutor's post-trial discretion is the legal equivalent of the failure to "suitably direct" the sentencing body's discretion. Stated another way, by requiring the prosecutor to exercise standardless discretion during a death penalty proceeding, Illinois has recreated the pre-*Furman* problem.

In upholding the constitutionality of the Illinois death penalty statute, the Illinois Supreme Court relied on the majority opinion in *Cousins*. In *Cousins*, the Court recognized that the Illinois statute contained no guidelines to govern the prosecutor's decision whether to convene a death penalty hearing. However, the Court referred to the aggravating and mitigating factors listed in Ill. Rev. Stat., 1977, Ch. 38, par. 9-1(b) and (c). The Court then assumed that the prosecutor would be guided by these factors. However, as Justice Ryan pointed out in his dissent in *Cousins*, there is no requirement in the statute that the prosecutor be so guided, and therefore the prosecutor is free to ignore these factors in making his decision. *People ex rel. Carey v. Cousins*, 77 Ill. 2d 53 (1979) (Justice Ryan, dissenting).

In fact after four years of operation of the Illinois Statute, facts and cases are now available to demonstrate the arbitrary and capricious exercise of discretion by local prosecutors which demonstrates the unconstitutionality of the statute. For example, in *People v. Greer*, 79 Ill. 2d 103, 402 N.E. 2d 203 (1980), both the Illinois Attorney General and the local prosecutor admitted that the local prosecutor's predecessor had erroneously (and successfully) sought imposition of the death penalty. In two other cases, the prosecutors reversed their own decisions to seek imposition of the death penalty for reasons apparently unrelated to either the possible existence of an aggravating factor or the prosecutor's evaluation of the evidence. *See, People v. Glen Hipkins*, 97 Ill. App. 3d 579, 423 N.E. 2d 208 (1981); *People v. Michael Robinson*, 87 Ill. App. 3d 621, 410 N.E. 2d 121 (1980). In *People v. Walker*, 84 Ill. 2d 512, 419 N.E. 2d 1167 (1981), the local prosecutor initially agreed to allow the defendant to plead guilty and receive a sixty year sentence. The defendant later withdrew the plea. The prosecutor, citing "mistake" and

concern for "conservation of tax dollars" as affecting his earlier opinion, changed his mind and requested the death penalty after defendant pleaded guilty once again.

A good example of the arbitrariness which exists in practice appears in a comparison of two similar central Illinois jurisdictions, Champaign and Sangamon Counties. Since the enactment of the Illinois death penalty statute, prosecutors in Champaign County have sought the death penalty in every murder case in which they felt an aggravating factor was present, including the present case. *See also People v. Robert Kirkpatrick*, 70 Ill. App. 3d 166, 387 N.E. 2d 1284 (4th Dist., 1979), (double murder); *People v. Theodore Parsons*, affirmed on appeal by unpublished order (4th Dist., No. 15065) (double murder); *People v. Jerry Gleckler*, 82 Ill. 2d 145, 411 N.E. 2d 849 (1980) (double murder); *People v. Michael LeCrone*, 4th District, No. 15877 (murder-robbery); *People v. Phillip Peeples*, 4th District, No. 16759 (murder-attempted rape); *People v. Andre Davis*, 4th District, No. 16995 (murder-rape). This practice is in sharp contrast to the apparent policy in nearby Sangamon County, where although five murder defendants were subject to the death penalty because a statutory aggravating factor existed, the prosecution has never sought the death penalty. See *People v. Ozark Nesbit*, Sangamon County Case No. 78-CF-537 (second murder conviction); *People v. Wesley Brents*, 4th District No. 16274 (murder-robbery); *People v. James Lee*, 4th District No. 16273 (murder-robbery); *People v. Vernon Hicks*, 4th District No. 16674 (murder-attempted murder-armed robbery); *People v. Donald Groth*, Sangamon County Case No. 80-CF-702 (second murder conviction).

The different results in these cases demonstrate that the fear of guideless prosecutorial discretion under Sec-

tion 9-1(d), to which Justice Ryan's dissent in *Cousins* referred, has now been borne out in practice.

It is no answer to the constitutional problem to argue that *Gregg* decided the issue. This Court in *Gregg* recognized that certain types of *pre-trial* prosecutorial discretion are unavoidable. One of the arguments urged by the defendants in *Gregg* and its companion cases was that the inherent power of the prosecutor to undercharge, not charge at all, and plea bargain, all of which would allow a particular defendant to escape the death penalty, rendered all death penalty statutes unconstitutionally arbitrary and capricious. In rejecting this argument, the Court viewed these prosecutorial decisions to be unavoidable and an integral part of our system.

Gregg allows the Illinois prosecutor to make the traditional *pre*-trial choices. But, the Illinois prosecutor is also given the power under the Illinois statute to make a *post*-trial choice and a vital one at that: whether to convene the penalty hearing and put the defendant's life in jeopardy. It is this choice, which was not an issue in *Gregg*, that we challenge here on Eighth Amendment grounds.

Thus, one major difference between the prosecutor's inherent pre-trial discretion attacked in *Gregg* and the prosecutor's discretion attacked here is that the former is unavoidable while the latter is fully avoidable.*

There is another major difference between the discretion approved in *Gregg* and that of Illinois prosecutors. In Georgia, the only way for a prosecutor to avoid a

* As this Court recognized in *Gregg*, to prohibit the traditional charging discretion in a death penalty case would in effect "outlaw" capital punishment. (428 U.S. at 199, n. 50). Our attack on the Illinois statute in no way challenges the traditional charging power of the prosecutor.

death penalty hearing is to refuse to charge a capital offense. Such undercharging would violate his duty as a prosecutor and the public trust. As three members of this Court found, however, very few prosecutors would arbitrarily ignore both their duty and public trust by failing to charge a capital offense, when warranted by the evidence, simply to avoid a death penalty. *Gregg v. Georgia*, 428 U.S. at 224-5 (White, J., Burger, C.J., and Rehnquist, J.).

In contrast to Georgia, the discretion afforded prosecutors in Illinois is totally different. As discussed above, the Illinois statute contains no standards whatever which govern the prosecutor's decision whether to seek the death penalty. The Illinois statute does not even require that the prosecutor request a death penalty hearing if his evidence establishes one or more of the statutory aggravating factors. Therefore, in contrast to Georgia, an Illinois prosecutor is free to not seek the death penalty as he sees fit, and that decision violates neither his duty nor the public trust.

In summary, the discretion granted Illinois prosecutors is unique and totally avoidable. Such discretion has not yet been reviewed by this Court. As demonstrated, the discretion afforded Illinois prosecutors is not a component of the traditional charging power. Also as demonstrated, that discretion is totally without standards. Therefore, by interjecting needless complications into the death sentencing process, the Illinois statute certainly has not "minimize(d) the risk of arbitrary and capricious" death sentences. *Gregg v. Georgia*, 428 U.S. at 189. Finally, although a majority of the Illinois Supreme Court have found the Illinois statute does violate the Eighth and Fourteenth Amendments, three of those justices have deferred to this Court for a final resolution of the issue.

For these reasons, certiorari should be granted.

CONCLUSION

While this Court has approved the exercise of the traditional charging discretion of the prosecutor when exercised in the capital sentencing process, this Court has not yet considered a death penalty statute like that of Illinois. Because the standardless, post-charging discretion given to Illinois prosecutors to convene a death sentence hearing in murder cases fails to "suitably direct" a crucial exercise of discretion in the capital sentencing process, the Illinois Death Penalty Statute violates the Eighth and Fourteenth Amendments. Moreover, although a majority of the Illinois Supreme Court have found that the Illinois statute does violate the Eighth and Fourteenth Amendments but have deferred to this Court for a final resolution of the issue, the Petition for Certiorari should be granted.

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